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In the Supreme Court of the United States

OCTOBER 1976

No._____

WILLADENE LIVINGSTON,
Petitioner,
vs.
FRED SHELTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

COMES NOW, Willadene Livingston and respectfully requests the Court that a Writ of Certiorari shall be issued to review the Judgment of the Supreme Court entered October 17, 1975 denying Petition for Rehearing of this Petitioner and Motion for Stay of Proceedings entered November 14, 1975.

OPINIONS BELOW

The Opinion of the Washington Court of Appeals appears as *Livingston v. Shelton*, 11 Wn. App. 854, 526 P.2d 385 (1974), Appendix A, p.1a through p.9a.

The Opinion of the Washington Supreme Court appears in Official Advance Sheets 85 Wn. 2d 615, 537 P.2d 774 (1975). (App. B pp. 10b to 16b).

Livingston's Petition for Rehearing before the Washington Supreme Court is set forth in complete context as Appendix C, pp. 17c to 54c.

Order Denying Petition for Rehearing was entered October 17, 1975, and appears as Appendix D, p. 55d.

Petitioner's Motion for Stay of Proceedings was denied November 14, 1975. Appendix E, pp. 56e to 57e.

Excerpts from page 1 of the Creditor's Claim of the Bank of Yakima, Yakima, Washington, filed in the Estate of Elwyn Judson Livingston, Deceased, No. 4074, Adams County, Washington, appears as Appendix F, p. 58.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USC Sec. 1257 (3) to review the Judgment of the Washington Supreme Court and Order Denying without opinion Petition for Rehearing entered October 17, 1975.

STATUTE INVOLVED

28 *USC, Section* 1257 (3):

> ". . . final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:

"... '(3) by Writ of Certiorari ... where any title, right, privilege or immunity is specifically set up or claimed under the Constitution ...' " (62 Stat. 929).

QUESTIONS PRESENTED

1. By failing to grant Petitioner Livingston subrogation to the Bank of Yakima's secured position as to certain estate real property, thereby depriving Livingston of her unlimited exemption rights under Revised Code of Washington, Sec. 48.18.410, did the Washington Supreme Court deny Livingston due process of law and equal protection of the laws as guaranteed by Amendment XIV to the United States Constitution?

2. What standards must be met in order to successfully obtain the issuance of a Writ of Certiorari out of the United States Supreme Court directed to the highest court in the State when the Decision of such State Court disregards statutory exemption rights created by legislative enactment pursuant to a mandate of the State Constitution of such State.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT XIV.

CONSTITUTION OF THE STATE OF WASHINGTON, Article XIX, Section 1 (Revised Code of Washington Annotated, Constitution Articles XII to end Amendments, p. 64).

Revised Code of Washington, Section 48.18.410 Revised Code of Washington Annotated, Title 48, p. 405, in full context as Appendix G.
Revised Code of Washington, Section 48.18.440 Revised Code of Washington Annotated, Title 48, p. 413, 414 in full context as Appendix H.

STATEMENT OF THE CASE

1. Superior Court of the State of Washington for Adams County will be referred to as the Trial Court.

2. The Court of Appeals of Washington, Division III, will be referred to as the Court of Appeals.

3. The Supreme Court of the State of Washington, Washington's Court of last resort, will be referred to as the Washington Supreme Court.

4. Willadene Livingston, the plaintiff below, will be referred to interchangeably as Petitioner, Livingston, or the beneficiary.

5. Fred Sh[illegible]n, defendant, will be referred to as respondent or administrator.

6. The Bank of Yakima, Yakima, Washington, will be referred to as the Bank.

7. To identify the record, "St." appearing in the text of Appendix C refers to the testimony in the Trial Court; "Tr" refers to transcript of the pleadings; "Ex." refers to the Exhibit as numbered in the Trial Court and throughout the appeal process.

8. Appendix A, B, C, D, E, F, G, H, and I are separately designated for identification but paged in numerical sequence for ready reference.

Before Petitioner filed her action, the Bank filed its claim in the Estate of Elwyn J. Livingston, Deceased, No. 4074, Adams County, Washington, in the sum of $623,887.46, claimed due at date of death. (App. F).

The Bank credited the estate in the sum of $432,-516.77, consisting of life insurance proceeds and one 1965 Ford truck, leaving a balance claimed due from the estate in the sum of $191,370.69. It is the application of insurance proceeds to the secured indebtedness that gave rise to the beneficiary's claim to subrogation to the Bank's primary security which primary security was ample to pay this claim in full.

Neither the life insurance policies nor the proceeds thereof have been inventoried as an asset of the estate. Neither has the administrator, nor any creditor, petitioned the Court to include the insurance proceeds or the policies as an asset of the estate. However, the administrator claims to be entitled, on behalf of the general creditors, to the exempt life insurance proceeds in diminution of the estate secured indebtedness due the Bank.

Petitioner here filed her complaint claiming subrogation requesting she be substituted to the position of the Bank only to the extent that her exempt separate life insurance proceeds were used to reduce the Bank's secured indebtedness.,

The complaint in subrogation was in aid of her statutory right and to enjoin the sale by the administrator of real estate for the benefit of general credi-

tors released after payment of the secured indebtedness.

The trial court dismissed the complaint at the close of petitioner's case, and without receiving any evidence in support of the administrator's numerous affirmative defenses. On September 16, 1974, the Court of Appeals reversed the trial court and granted subrogation as an aid to the preservation of the beneficiary's exempt property rights created by statute. (App. A).

Petition for Rehearing was denied by the Court of Appeals on November 19, 1974. (App. A).

Review was granted by the Washington Supreme Court on January 22, 1975. (App. A).

On July 3, 1975, the Supreme Court of the State of Washington reversed the Court of Appeals, and in its Decision, (App. B) either overlooked or ignored *RCW* 48.18.410 (App. G) and *RCW* 48.18.440 (App. H) and its prior Decisions later cited herein.

The beneficiary's Petition for Rehearing addressed to the Washington State Supreme Court was denied without Opinion on October 17, 1975. (App. D) (Remittitur App. I).

Motion to Stay Proceedings in the Supreme Court of the State of Washington was denied without Opinion on November 14, 1975. (App. E).

FEDERAL QUESTIONS RAISED

1. The Petitioner claimed her exemption rights, which is a property right created by statute (RCW 48.18.410) at the pleading stage (Pf. Tr. 25) and at every stage of the case thereafter. (App. A, p. 6a), App. C, 18c, 19c, 30c, 32c, 44c, 47c, 52c. Neither *RCW 48.18.410* nor *RCW 48.18.440* are mentioned in the Washington Supreme Court Decision.

2. Petitioner did not raise the question of deprivation of her constitutional rights resulting from the decision of the Washington Supreme Court until her Petition for Rehearing which Petition was denied without opinion (App. C, pp. 19c). (App. E p. 56e).

The petitioner will amplify the import of the Federal question raised under Reasons for Granting the Writ. The decision in Livingston was a drastic departure from its decision in *In Re Elliott*, 72 Wn. 2d 600, 446 P. 2d 347 (1968) and the Washington Supreme Court's analysis of *RCW 48.18.410* relied on by the beneficiary, a departure that she could not anticipate. The petitioner had a right to rely on the decision and statutory law above cited. The denial by the Washington Supreme Court of this admitted property right denied to petitioner a right, title, privilege or immunity guaranteed to her by *United States Constitution Amendment XIV*.

REASONS FOR GRANTING THE WRIT

The Constitution of the State of Washington was ratified on October 1, 1889. In 1895 the legislature exempted life insurance proceeds from debt.

In Re Northern Sav. & Loan Ass'n. v. Kneisley, 193 Wn. 372, 76 P. 2d 297 (En Banc, 1938), states at page 376:

> "The first statute of this State exempting the proceeds of policies of life insurance is found in Chapter 125, Laws of 1895, p. 336, and reads as follows: 'Sec. 1. That the proceeds or avails of all life insurance shall be exempt from all liability for any debt.' "

and at page 377, states:

> "It should also be noted that, by each amendment, the statutory exemption has been extended."

Northern Sav. & Loan v. Kneisley, supra, intercites at page 382 the case of *Holden v. Stratton*, 198 U.S. 202, 49 L. Ed. 1018, 25 S. Ct. 656 where the United States Supreme Court examined Washington's life insurance exemption statute and observed as stated at page 386:

> "The statute is too plain to require construction. Any other interpretation than to follow the simple and direct mandate of the statute would be legislation."

There has been no change in effect in the wording of the Washington life insurance exemption statute since the date of *Holden v. Stratton* supra.

The language of *RCW 48.18.410* is set forth in full context as Appendix G, and provides in excerpt as follows:

> "The lawful beneficiary, assignee, or payee of a life insurance policy . . . shall be entitled to the proceeds . . . of the policy against the creditors and representatives of the insured . . . and such proceeds . . . shall also be exempt from all liability for any debt of the beneficiary, existing at the time the proceeds are . . . made available for his own use."

The language of the exemption statute is clear and unequivocal. The beneficiary, as petitioner herein, is entitled to the proceeds of the life insurance against the "creditors and representatives of the insured."

The respondent, as administrator, claims as a representative of the insured in an attempt to enforce a derivative right on behalf of general creditors of the insured denied him by the express language of the statute. It is equally clear from the language of the statute that the proceeds of life insurance are exempt from ". . . all liability for any debt of such beneficiary . . ." meaning any community, separate, joint, or several obligation of such beneficiary.

The wording of RCW 48.18.410 contains the exact language of the statute in effect on the date of *In Re Elliott*, 74 Wn. 2d 600, 618, 624, 440 P. 2d 347 (1968) where the Washington Supreme Court certified the law of Washington on this statute to the U.S. District Court of the Western District of Washington. The Washington Court noted that it recognized the sovereign will of the people as expressed by the legislature and that the Court exercises "only judicial power," and at page 616, states:

> "We believe that citizens of the state are entitled to have the same rule of law applied on an issue

regardless of whether it arises in a federal or state court."

And further observed at page 620:

> "All exemption statutes are to be liberally construed to effect their intent and purpose. *Northern Sav. & Loan Ass'n. v. Kneisley*, 193 Wash. 372, 378, 76 P. 2d 297 (1938) with cited cases."
> "The term 'proceeds and avails' as used by many life insurance exemption statutes, includes the cash surrender value of the policies. *Turner v. Bovee*, 92 F. 2d 791 (9th Cir., 1937) . . ."
> "The Washington statute is remedial in nature and enacted for the public good, and to hold that the cash surrender option or any other interest of the insured under the policy is a property right which is not exempt but is available to the insured's creditors, is to wipe out the protective benefits of the policy and defeat the carefully considered and deliberately enacted statutory purpose of the exemption provisions of the act."

Adopting the language of the Court, the decision in Livingston wipes out the protective benefits of the policies; thwarts the legislative purpose of the act; and defeats the carefully considered and deliberately enacted statutory exemption granted petitioner.

The legislature for a period of eighty years has not limited the amount of life insurance proceeds exempt from the creditors of the insured and beneficiary, and the Court should not do so. It is respectfully submitted that the Washington Supreme Court became concerned with the amount of the claimed exemption, approximately $425,000.00, rather than the law of exemption, and thereby encroached upon the legislative prerogative to determine the amount and extent of the

exemption. The Supreme Court in Washington in effect repealed the exemption statute by judicial decision or attempted to limit the exemption by denying subrogation. *In Re Elliott*, supra, and *RCW 48.18.410* were overlooked.

The Court of Appeals in its decision, appearing as Appendix A, granted subrogation as an aid to or a mere vehicle by which the substantive exemption rights of the petitioner were preserved.

The decision in Livingston is in effect judicial legislation prejudicial to the property rights of petitioner that results in the repeal or limitation in scope of *RCW 48.18.410*. Such decision deprives Livingston of her exemption rights based on the statute and prior decisions of the Washington Supreme Court and upon which she had a right to rely. Livingston's rightfully expected rights are thus lost expos-facto, thereby depriving her of due process of law. Livingston had no forewarning of the Washington Supreme Court's drastic departure from the court's position relative to the exemption statute and *In Re Elliott*, supra.

The beneficiary, Livingston, was denied equal protection of the law. As beneficiary, Livingston had a right, under the 14th Amendment, to be treated as any other beneficiary and to have the laws of the State applied to her as they did to any other person in similar circumstances.

RCW 48.18.410 grants an exemption to all persons of a class in which Livingston was a member. As noted *In Re Elliott*, supra, the Washington Supreme Court

has consistently upheld the statutory exemption when applied to other persons within the class. Equal protection has been denied Livingston in spite of the clear language of the statute, thereby denying her rights accorded to others within the same statutory class.

The basic scope of the Supreme Court review of decisions of the highest court of the state is set out as follows in *1 Barron & Holtzoff* (Wright Ed. Sec. 57, p. 309, et seq.:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court*** by certiorari if *** any right, title, privilege or immunity is specially set up or claimed under the Constitution *** of, the United States. ***"
> "The Supreme Court will not review a state court decision, even though a federal question is involved, if the decision rests on an adequate state ground, *but the Court itself will determine whether the state ground relied on is adequate.*" (Emphasis supplied).

Livingston contends that the decision of the Washington Supreme Court is not based on adequate grounds for the reason that:

1. Livingston's statutory exemption was denied.

2. She was thus deprived of a property right guaranteed her by statute pursuant to Washington State Constitutional mandate and the 14th Amendment.

3. No case was cited in the decision or submitted to the court by the administrator where the class of persons represented by Livingston was denied exemption rights and equal protection under the law.

The general rule applicable to Livingston is best viewed through comparison in principle with the three following cases:

In *Broad River Power Co. v. State of South Carolina*, 281 U.S. 537, 74 L.Ed. 1023, 50 S.Ct. 401 (1930), dismissing the Writ of Certiorari as improvidently granted where the judgment of the State Court was supported by substantial grounds is set forth the general rule contended for by Livingston.

> "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the Constitutional protection invoked be denied on non-federal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis. *If unsubstantial, constitutional obligations may not be thus evaded.*" (Emphasis added, citations omitted).
>
> "But if there is no evasion of the constitutional issue (citations omitted), and the nonfederal ground of decision has fair support (citations omitted), this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court."

The rule quoted above was cited with approval fourteen years later in *Demorest et al v. City Bank Farmers Trust Co.*, 321 U.S. 36, 38, L.Ed. 526, 64 S. Ct. 384, where a New York statute which (retroactively as well as prospectively) provided for a certain allotment of proceeds between remaindermen and life tenants in mortgage salvage operations, was challenged

as violative of due process in that it changed a rule of property established by judicial decision *retroactively*. The Supreme Court denied relief to the Petitioner. This case should, of course, be contrasted with the Livingston — where exactly the opposite sequence is true, i.e. it is the Court which is attempting to apply (retroactively) a new contrary *judicial* rule of law relative to established statutory provisions in order to limit or deny a statutory exemption right.

The *Demorest* case, supra, was cited approvingly in Mr. Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 19 L.Ed 2d 530, 88 S. Ct. 438 (1967) wherein Mr. Justice Stewart made the following comments applicable to Livingston.

> "***But to the extent (the Washington State Supreme Court decision) constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference (to the judgment of the state court) would be appropriate. ***Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court."

The decision in Livingston "worked an unpredictable change in the state law" relied upon by the beneficiary.

Lastly, the debt for which the beneficiary's exempt proceeds were taken is admittedly a community debt. (App. C 37c and 47c.)

The proceeds of the life insurance policies were the separate property of the wife-beneficiary, both pursuant to *RCW 48.18.440*, (App. H), and by agreement

between the beneficiary and her deceased husband.

The Washington community property law does not permit separate property of the wife to be used to pay community debts. *In Re Schoenfeld's Estate*, 56 Wn. 2d 197, 351 P. 2d 935, the Washington court would not permit the husband's separate property to be applied to the community debts of the deceased husband and wife before the community property was exhausted. A strong corollary here exists where an administrator attempts to take credit for the separate exempt property of the wife to pay community debts without exhausting the community security. The administrator should not be permitted to do so. The Bank applied the beneficiary's life policies proceeds to the secured debt due it before it applied its ample community security.

The administrator is obligated under Washington law to first exhaust community property in payment of community debts. He did not do so. Further, it is admitted that had the Bank applied the community security in payment of the community debt that the life proceeds would be exempt to petitioner free and clear of any claim of the administrator or the general estate creditors. (App. A, p. 6a). By applying petitioner's separate exempt life insurance proceeds to the payment of a secured community debt, releases security that will be used to pay general estate creditors, creditors who cannot lawfully claim exempt insurance proceeds. The exemption statute is thereby circumvented.

The administrator should then be compelled to substitute the secured real property for the exempt property used to reduce the indebtedness due the Bank.

The Supreme Court of Washington ignored Livingston's property rights by holding that Livingston should not be subrogated to a debt owed by the estate. Lost in the emphasis on remedy and overlooked by the Washington Supreme Court is the fact that the insurance proceeds are exempt from all liability whether the liability is community, separate, joint or several. If it were assumed that the repayment obligation was the personal obligation of the beneficiary, the exemption statute would still apply.

The Supreme Court of Washington also overlooked the fact that Livingston did not seek to be subrogated to the repayment obligation, but was entitled to be subrogated to the rights of the Bank in the security — a totally different posture taken by Livingston than the Court indicated in its decision. The Washington Supreme Court thereby failed to distinguish between the repayment obligation in personam and the beneficiary's rights in rem to the security. Regardless of any argument or decision to the contrary, the Washington Supreme Court has deprived Livingston of her exemption rights and her separate property without due process. The factual observations of the Court are refuted by the express language of the statute and the Exhibits referred to in the Petition for Rehearing. (App. C.). No evidence was received on the question and the record is totally bare of any evidence to support an assumed waiver of exemption rights by the

beneficiary, and the beneficiary was never permitted to defend against this unwarranted assumption. By refusing to acknowledge petitioner's exemption rights and simultaneously granting exemption rights to other persons of the same statutory class as in *Northern Sav. & Loan Ass'n. v. Kneisley*, supra, and *In Re Elliott*, supra, the Washington Supreme Court has failed to grant petitioner equal protection under the law. The legislature is the only branch of our government authorized to limit exemptions. For our Washington Supreme Court to do so by holding that petitioner has no personal remedy in subrogation rather than the right to be subrogated to the security obligation, permits the general creditors and the administrator to thwart and:

> ". . . to wipe out the protective benefits of the policy and defeat the carefully considered and deliberately enacted statutory purpose of the exemption provisions of the act."

The Court's assumption that the assignment of the policies for security purposes transferred title is contrary to the express language of the assignment documents, as well as the Washington law. *Olson v. Nat'l Grocery Co.*, 15 Wn. 2d 164, 166, 167, 130 P. 2d 78 (En Banc, 1942). Title to the mortgaged real property also remained in the beneficiary. The decision permits the administrator, as agent of the court, to sell real property to pay a debt from property exempt from all liability of the beneficiary. Such procedure is not due process.

Where the highest Court of the state arbitrarily ignores the clear and unequivocal statutory law of the state and its decisions, decisions couched in the language of the statute, the petitioner, as here, should find redress in the United States Supreme Court.

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,
W. WALTERS MILLER
MILLER & SACKMANN
Attorneys for Petitioner
210 W. Main — P.O. Box 497
Ritzville, Washington 99169
Telephone: (509) 659-1000

APPENDIX A

OPINION OF THE COURT OF APPEALS

STATE OF WASHINGTON, DIVISION III

LIVINGSTON v. SHELTON [Sept. 1974

11 Wn. App. 854, 526 P.2d 385

[No. 795-3. Division Three. September 16, 1974.]

WILLADENE LIVINGSTON, *Appellant*, v. FRED SHELTON, *as Administrator, et al., Respondents.*

[1] **Assignments for Benefit of Creditors — Insurance — Subrogation by Beneficiary — In General.** A beneficiary of a life insurance policy which the insured has assigned along with other assets as security for debts, may subrogate to the creditor's lien rights against the other security to the extent that the insurance proceeds instead of the other security were applied against the debts, so long as the parties intended the insurance proceeds to be a *secondary* source of payment of the debts.

[See Ann. 91 A.L.R.2d 496; 43 Am. Jur. 2d, Insurance §§ 717, 718.]

[2] **Insurance — Exemptions — Construction — Public Policy.** The policy underlying RCW 48.18.410, which gives an insurance beneficiary priority over claims of the insured's creditors with respect to the proceeds and avails of life insurance, will not be found to be voluntarily relinquished in the absence of a clear intention otherwise.

[3] **Equity — Liens — Creditor's Release of Security — Effect.** Equity operates to continue a valid lien in favor of a subrogee of the creditor despite the execution of a release by the creditor, except with respect to innocent third persons who act in reliance upon such release.

Appeal from a judgment of the Superior Court for Adams County, No. 11185, Richard J. Ennis, J., entered December 26, 1972. *Reversed.*

Action for subrogation and to enjoin the sale of real property. The plaintiff appeals from a judgment in favor of the defendants.

W. Walters Miller (of *Miller & Sackmann*), for appellant.

Fred Shelton, for respondents.

[As amended by order of the Court of Appeals November 18, 1974.]

GREEN, C.J. — Plaintiff, Willadene Livingston, brought this action against the administrator of the estate of her deceased husband, Elwyn J. Livingston, claiming a right to be subrogated to the position of the Bank of Yakima with respect to certain assets in the estate and to enjoin the administrator from selling the real property mortgaged to the bank. Plaintiff appeals from a judgment of dismissal entered at the close of plaintiff's case.

The plaintiff and her husband obtained substantial loans from the Bank of Yakima to finance their farming and related business operations in and around Othello. As security for these loans, they executed, along with promissory notes, certain real estate mortgages, assignments of accounts receivable, and a general loan and collateral agreement. Additionally, the decedent, as insured, and the plaintiff as owner and beneficiary, assigned three life insurance policies to the bank.

On December 11, 1968, Mr. Livingston died from injuries received in an automobile accident, at which time the balance owing to the Bank of Yakima on the notes was $623,887.46. The bank elected to receive the proceeds of the three insurance policies, $453,516.77, rather than to foreclose the real property mortgages. Neither the total value of the bank's security nor the extent to which the bank proceeded against security

other than the insurance policies is disclosed by the record.

[1] The dismissal of the plaintiff's complaint presents one basic issue on appeal: Is the beneficiary of a life insurance policy assigned as collateral, along with other security, to secure a promissory note, entitled to subrogation or equitable lien rights against the other security now in the insured's estate for the amount of insurance proceeds applied against the note by the assignee-creditor? We answer "yes."

While there is no case in this state decisive of this question, many jurisdictions have recognized a beneficiary's right to subrogation. *Chaplin v. Merchants Nat'l Bank*, 186 F. Supp. 273 (N.D. Ill. 1959); *Smith v. Wells*, 72 Ind. App. 29, 122 N.E. 334, 123 N.E. 644 (1919); *Barbin v. Moore*, 85 N.H. 362, 159 A. 409, 83 A.L.R. 62 (1932); *Russell v. Owen*, 203 N.C. 262, 165 S.E. 687 (1932); *Katz v Ohio Nat'l Bank*, 127 Ohio 531, 191 N.E. 782 (1934); *see Ex Parte Boddie*, 200 S.C. 379, 21 S.E.2d 4 (1942); *Smith v. Coleman*, 184 Va. 259, 35 S.E.2d 107, 160 A.L.R. 1376 (1945); *In re Estate of Cummings*, 200 Misc. 467, 105 N.Y.S.2d 104 (1951); *In re Gallagher's Will*, 57 N.M. 112, 255 P.2d 317, 329-30 (1953); *Walzer v. Walzer*, 3 N.Y.2d 8, 163 N.Y.S.2d 632, 143 N.E.2d 361 (1957); *Seitz v. Seitz*, 238 Miss. 296, 118 So. 2d 351 (1960); *In re Crossman's Will*, 39 Misc. 2d 1094, 242 N.Y.S. 2d 576 (1963); *In re Estate of Goudiss*, 39 Misc. 2d 18, 239 N.Y.S.2d 907 (1963); *Rountree v. Frazee*, 209 So. 2d 424 (Ala. 1968); *Murnane v. Murnane*, 447 S.W.2d 590 (Ky. App. 1969). The right of subrogation depends upon

whether the parties to the loan intended the insurance proceeds to be the primary or secondary source for payment of the debt. 16 G. Couch, *Insurance* § 61.328-330 (2d ed. R. Anderson 1966); 2A J. Appleman, *Insurance Law and Practice* §§ 1311, 1316 (1966); *see* 43 Am. Jur. 2d *Insurance* §§ 717, 718 (1969); Annot., 160 A.L.R. 1376 (1946); Annot., 91 A.L.R.2d 496 (1963). On this point the authors of 43 Am. Jur. 2d *Insurance* §§ 717, 718 (1969) state:

§ 717:

> Whether the beneficiary of a life insurance policy which the insured pledged as security for debts has the right to be subrogated to the pledgee's claim against the insured's estate for the amount paid to the pledgee out of the proceeds of the policy depends primarily upon the intention of the insured. Thus, the beneficiary's right to subrogation will be recognized where it can be concluded from all the facts and circumstances that the insured intended him to be so entitled. Applying this principle, *it has been held that the beneficiary is entitled to subrogation to the claim of a creditor against the estate of the insured, where* the creditor, instead of proceeding against the estate, obtains satisfaction from the proceeds of the policy, which had been assigned to him as security for payment of the debt, and *nothing appears in the assignment or the will to indicate an intention that the insurance proceeds should be the primary source of payment of the debt. . . .*

§ 718:

> A distinct situation is presented where the insured procured a loan evidenced by his note and a trust deed or mortgage on real estate owned by him, and assigned a policy of insurance on his life as additional collateral for the loan. Under such

> circumstances the beneficiary seeking subrogation to the rights of the creditor does not merely assert a right as a common creditor against the general assets of the insured's estate, but seeks to be subrogated to the position of a creditor having the right to foreclose against specific real estate securing the debt. In such cases, the right to recover is made to depend upon intention — that is, whether it appears from all the facts and circumstances that it was the intention of the parties to the loan transaction that the policy should be first applied to the payment of the debt, or whether it was intended that the real estate should be first used to satisfy the indebtedness.

(Italics ours. Footnotes omitted.)

Here, nothing in the assignment of the insurance policies or in the other evidence indicates that the insurance proceeds were intended to be the primary source for repayment of the loans. At the time the loans were obtained, the decedent (under 45 years of age) and plaintiff mortgaged or assigned substantial assets other than the three insurance policies to the bank as security. Mrs. Livingston testified, "they [the bank] depended on the mortgages and his [decedent's] past performances." As to the assignments she testified, "I don't think we foresaw Mike's death. That's just something additional that they do require." In the context of the record, it would be unreasonable to infer that the parties intended the insurance proceeds to be the primary source of payment where the existence of those proceeds hinged upon the unanticipated death of the insured, a relatively young man.] If this were the intention, the assignments should have so provided or the bank should have been named a beneficiary.]

There being no evidence of a contrary intent, the other security, now assets in Mr. Livingston's estate, realistically must be deemed intended to have been the primary source of payment and the assigned insurance proceeds a secondary source of payment. Thus, under the cited authorities, there is a prima facie showing that subrogation should be allowed to the extent requested in plaintiff's complaint.

[1]In *Barbin v. Moore*, 85 N.H. 362, 159 A. 409, 83 A.L.R. 62 (1932), the court said, at page 371:

"In this state of the title Leclerc [the decedent] exercised his power to pledge the policies as collateral security, in the event of his death, for a debt he was about to incur. That was all he did. He did not undertake to make a formal change of beneficiaries, either in whole or in part. If he had wished to have the insurance go to pay the debt in any event and to the enrichment of his estate, he could have made his creditor the designated beneficiary to the extent of its claim. His failure to do this is significant of his purpose . . . It evidences his design to secure his prospective creditor, and at the same time not to impair the beneficiaries' title beyond what was necessary to protect the lender. The distinction between an assignment of a policy and a change of beneficiary is one well recognized in law. Both are permitted under these policies, and the choice between them made by the insured indicates what he had in mind to accomplish by the transaction." [Citations omitted.]

[2]RCW 48.18.410 provides, in part:

"The lawful beneficiary, assignee, or payee of a life insurance policy . . .

shall be entitled to the proceeds and avails of the policy against the creditors and representatives of the insured and of the person effecting the insurance, and such proceeds and avails shall also be exempt from all liability for any debt of such beneficiary, existing at the time the proceeds or avails are made available for his own use."

[2] This holding finds support for another reason. Had the bank elected to proceed against the other security, rather than against the life insurance proceeds, these proceeds would have been exempt from the claim of any creditor of decedent or plaintiff under RCW 48.18.410.[2] While the assignment permitted the bank at its option to apply the insurance proceeds

against the loans, there is no evidence the parties by the assignment intended to release plaintiff's exemption rights in favor of the general creditors of the insured's estate. To permit the bank at its option to do so, would defeat the statutory exemption. In this case, giving the plaintiff a subrogation right in the other security to the extent that exempt proceeds were used to satisfy the bank loans does not affect the ultimate position of the estate creditors and preserves the beneficiary's statutory exemption. *See Barbin v. Moore, supra; In re Elliott*, 74 Wn.2d 600, 620, 446 P.2d 347 (1968). A contrary result should be reached only in the presence of a clear intention to do so.

The administrator urges the trial court correctly determined that plaintiff had a mere expectancy in the proceeds of the life insurance policies and upon assignment to the bank before that expectancy matured. plaintiff never became the owner of the proceeds. As a result, the administrator contends that no subrogation right exists. We disagree. Plaintiff's right to the proceeds as beneficiary was subject to the bank's prior claim under its assignment. Had the bank elected to pursue the other security, it is evident the proceeds would have been paid to plaintiff; or, if only a part of the proceeds were used, the balance would have accrued to plaintiff. The ownership was at all times in the plaintiff-beneficiary, subject only to the assignment.

[3] It is also urged that because the bank released its mortgage on the real property after having been

paid from the life insurance proceeds, plaintiff lost the bank's priority status as a mortgagee and as a result lost her subrogation rights or at most is a general creditor in the estate. We disagree. It is evident that the priority rights of creditors were established at the time of the decedent's death. In the absence of intervening rights in reliance on the bank's release, the unilateral release by the bank does not operate to destroy the lien as to the plaintiff. As to the plaintiff, equity operates in such circumstances to continue that lien in her favor as subrogee. Recognition of this concept by the courts is summarized in 51 Am. Jur. 2d *Liens* § 59 (1970):

> Under the doctrine of subrogation, which is elsewhere discussed, a lien will be kept alive, under some circumstances, in favor of one who has paid the lienholder, although the latter has satisfied and discharged it of record, provided that the equity is not a latent one and will not prejudice a bona fide purchaser. Thus, where a debtor, by fraudulent representations, induces a person to advance money to pay off liens on the debtor's property to redeem the property from execution sale, and to release a judgment of his own against the debtor which was a lien on the debtor's property, such person will, as against the debtor, be subrogated to the rights of the persons whose liens his money discharged.

(Footnotes omitted.) and in J. Elder, *Stearns Law of Suretyship* § 11.7 (5th ed. 1951):

> The equity of the surety who pays the debt is superior to any subsequent claim of the creditor and a cancellation of the mortgage by the creditor after payment, disregarding the equity of the surety, will not affect the right of subrogation, ex-

> cept as to innocent third persons whose claims thereafter attach. Thus, where the creditor, on receipt of payment from the surety, entered a satisfaction of the mortgage on the records and thereafter acquired a judgment lien upon the land, it was held that the equity of the surety was superior to the judgment lien.

(Footnotes omitted.)

Therefore, as in other jurisdictions, we hold that plaintiff made a prima facie showing that she is entitled to be subrogated to the rights of the Bank of Yakima against those assets of the decedent's estate given as security for the loans to the extent the insurance proceeds were used to pay such loans as prayed for in her complaint.

The judgment of dismissal entered at the close of plaintiff's evidence is reversed and the cause remanded for resumption of proceedings in accordance with this opinion.

MUNSON and MCINTURFF, JJ., concur.

Petition for rehearing denied November 19, 1974.

Review granted by Supreme Court January 22, 1975.

APPENDIX B

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

LIVINGSTON v. SHELTON
85 Wn. 2d 615, 537 P.2d 774 (1975)
[No. 43546. En Banc. July 3, 1975.]

WILLADENE LIVINGSTON, *Respondent*, v. FRED SHELTON, *as Administrator, Petitioner.*

[1] **Community Property — Insurance — Life Insurance — Community Funds — Spouse as Beneficiary.** A spouse named as beneficiary in life insurance policies which are purchased from community funds and are thereby considered community assets, is properly categorized as a coowner-beneficiary.

[2] **Subrogation — Elements — Effect.** Rights to subrogation may be created when a party is compelled to pay or discharge another's debts, for which the subrogee has no primary liability, in order to protect such subrogee's own rights and interests. Such subrogation rights are based upon equity and will be protected only when justice so requires.

[3] **Assignments for Benefit of Creditors — Insurance — Subrogation by Beneficiary — Coowner.** A coowner-beneficiary of assigned insurance policies, who is a primary debtor with regard to the debts for which the assignment is made, may not acquire any rights to subrogation regarding such debts.

Review of a decision of the Court of Appeals, September 16, 1974, 11 Wn. App. 854. *Reversed.*

The Court of Appeals reversed a judgment of the Superior Court for Adams County, No. 11185, Richard J. Ennis, J., entered December 26, 1972. The respondents (defendants) petitioned the Supreme Court for review.

Action for subrogation and to enjoin the sale of real property. The plaintiff appealed to the Court of Appeals from a judgment in favor of the defendants.

Miller & Sackmann and *W. Walters Miller*, for appellant.

Fred Shelton, pro se.

WRIGHT, J. — The issue herein is whether the surviving spouse is subrogated to the position of a secured creditor of her husband's estate by reason of the assignment by her of all her interest in three insurance policies to a creditor-bank, as collateral for a loan made to the marital community. We answer in the negative, reversing the Court of Appeals and reinstating the judgment of dismissal by the trial court against the widow, who was plaintiff in the trial court.

The Livingstons obtained substantial loans from the Bank of Yakima to finance their farming and related business operations in and around Othello. As security for these loans, they executed promissory notes, real estate mortgages, assignments of accounts receivable, and a general loan and collateral agreement. In addition, they assigned to the bank three life insurance policies on the life of Mr. Livingston.

On December 11, 1968, Mr. Livingston died from injuries received in an automobile accident. The balance then owing to the Bank of Yakima was $623,887.46. The bank elected to take the proceeds of the three insurance policies, $423,516.77, and thereby avoid foreclosure of the real property mortgages. The bank was listed as a party in the caption of this case, but was never served with process and has taken no part in this litigation. The bank, in fact, has been paid in full. The present administrator approved and paid a credi-

tor's claim for the difference between the proceeds of the policies of life insurance and the total owed to the bank.

The widow, as beneficiary under the policies, filed an action outside of probate, claiming her right of subrogation and was thereupon removed as executrix. *In re Estate of Livingston*, 7 Wn. App. 841, 502 P.2d 1247 (1972). The trial court dismissed the action, finding no right to subrogation. The Court of Appeals reversed.

The Court of Appeals, in its detailed examination of the authorities dealing with the issue of subrogation to insurance proceeds assignment in probate proceedings, stated the law correctly in *Livingston v. Shelton*, 11 Wn. App. 854, 526 P.2d 385 (1974) at 855-56:

> While there is no case in this state decisive of this question, many jurisdictions have recognized a beneficiary's right to subrogation. *Chaplin v. Merchants Nat'l Bank*, 186 F. Supp. 273 (N.D. Ill. 1959); *Smith v. Wells*, 72 Ind. App. 29, 122 N.E. 334, 123 N.E. 644 (1919); *Barbin v. Moore*, 85 N.H. 362, 159 A. 409, 83 A.L.R. 62 (1932); *Russell v. Owen*, 203 N.C. 262, 165 S.E. 687 (1932); *Katz v. Ohio Nat'l Bank*, 127 Ohio 531, 191 N.E. 782 (1934); *see Ex Parte Boddie*, 200 S.C. 379, 21 S.E. 2d 4 (1942); *Smith v. Coleman*, 184 Va. 259, 35 S.E.2d 107, 160 A.L.R. 1376 (1945); *In re Estate of Cummings*, 200 Misc. 467, 105 N.Y.S.2d 104 (1951); *In re Gallagher's Will*, 57 N.M. 112, 255 P.2d 317, 329-30 (1953); *Walzer v. Walzer*, 3 N.Y. 2d 8, 163 N.Y.S.2d 632, 143 N.E.2d 361 (1957); *Seitz v. Seitz*, 238 Miss. 296, 118 So. 2d 351 (1960); *In re Crossman's Will*, 39 Misc. 2d 1094, 242 N.Y.S. 2d 576 (1963); *In re Estate of Goudiss*, 39 Misc. 2d 18, 239 N.Y.S.2d 907 (1963); *Rountree v. Frazee*, 209 So. 2d 424 (Ala. 1968); *Murnane v. Mur-*

nane, 447 S.W.2d 590 (Ky. App. 1969). The right of subrogation depends upon whether the parties to the loan intended the insurance proceeds to be the primary or secondary source for payment of the debt. 16 G. Couch, *Insurance* § 61.328-330 (2d ed. R. Anderson 1966); 2A J. Appleman, *Insurance Law and Practice* §§ 1311, 1316 (1966); *see* 43 Am. Jur. 2d *Insurance* §§ 717, 718 (1969); Annot., 160 A.L.R. 1376 (1946); Annot., 91 A.L.R.2d 496 (1963).

Our own examination of these and other authorities, reveals that the facts of this case warrant the application of a different rule. For as the trial court correctly said, this is not a subrogation case at all. In all of the above cases, the loan for which security was given, was made only to the deceased without the beneficiary joining in the obligation to repay, or sharing in the right to spend the money advanced. Except for *In re Gallagher's Will*, 57 N.M. 112, 255 P.2d 317, 37 A.L.R. 2d 149 (1953), which is distinguishable, no case has dealt with subrogation where a marital community, in a community property jurisdiction, has acquired ownership in the insurance policy which is being offered as collateral for a community obligation. In *Gallagher* there was no problem of adequate assets to pay all creditors. On the contrary, in the instant case there were substantial problems as to the solvency of the estate. *In re Estate of Livingston*, 7 Wn. App. 841, 502 P.2d 1247 (1972); *Shell Oil Co. v. Livingston Fertilizer & Chem. Co.*, 9 Wn. App. 596, 513 P.2d 861 (1973). The only reason subrogation was sought in *Gallagher* was to reduce inheritance taxes. The bank therein filed a creditor's claim for the amount which had been bor-

rowed by deceased and the surviving spouse and took payment from insurance proceeds. Finally, none of the cases or texts mentioned above, nor cases revealed in our own examination of the law, deal with a factual situation where the party seeking subrogation has an ownership interest in the policy offered as collateral and has voluntarily assigned his or her rights as beneficiary in such policy, as a condition to receiving the loan.

[1] In the instant action, the spouses constitute a single unity in all of the transactions involved herein. The decedent and his spouse were both codebtors to the bank, since both signed the instruments of debt as members of the community and individually. In addition to the community composed of Mr. and Mrs. Livingston, there were several closely held corporations involved in the transactions with the bank, in which corporations both were officers, directors and stockholders. The three life insurance policies are community assets because premiums were paid with community funds. *Occidental Life Ins. Co. v. Powers*, 192 Wash. 475, 74 P.2d 27, 114 A.L.R. 531 (1937); *In re Estate of Coffey*, 195 Wash. 379, 81 P.2d 283 (1938); *King v. Prudential Ins. Co. of America*, 13 Wn.2d 414, 125 P.2d 282 (1942); *In re Estate of Towey*, 22 Wn.2d 212, 155 P.2d 273 (1945); *Small v. Bartyzel*, 27 Wn.2d 176, 177 P.2d 391 (1947). Therefore, the plaintiff must be classified as a coowner/beneficiary in the three policies. *In re Estate of Leuthold*, 52 Wn.2d 299, 324 P.2d 1103 (1958). She voluntarily assigned all her interest, separate and otherwise, in the proceeds of the policy

and because of that assignment, the loan was made.

[2] Subrogation exists only as a three-party transaction, where the subrogee is answering for the debt of another. As stated in *Lawyers Title Ins. Corp. v. Edmar Constr. Co.*, 294 A.2d 865 (D.C. Ct. App. 1972) at 869:

> Generally speaking, "the essential elements necessary for legal subrogation . . . are: (1) the existence of a debt or obligation for which a party, other than the subrogee, is primarily liable which (2) the subrogee, who is neither a volunteer nor an intermeddler, pays or discharges in order to protect his own rights and interests." [Citation Omitted.] But more specifically, "the question as to whether one is entitled to subrogation, depends on whether the claimant is a mere volunteer and, *if not, whether he is on equitable principles entitled to such subrogation* as against other claimants." [Citation omitted.] (emphasis added).
>
> The right to subrogation depends upon "the circumstances and equities of the particular case." [Citation omitted.] It is normally "enforced only in favor of a superior equity, and it is for the equity court to say who, in good conscience, should bear the loss. . . . Accordingly, subrogation [may] be invoked only where justice [demands] its application and where the equities of the party asking it [are] greater than those of his adversary." [Citation omitted.]

In *Austin v. Wright*, 156 Wash. 24, 30, 286 P. 48 (1930), we stated that:

> "Subrogation is allowed only in favor of one who under some duty or compulsion, legal or moral, pays the debt of another; and not in favor of him who pays a debt in performance of his own covenants, for the right of subrogation never follows

> an actual primary liability, and there can be no right of subrogation in one whose duty it is to pay, or in one claiming under him against one who is secondarily liable, or not liable at all. In such cases payment is extinguishment." 37 Cyc. 374.
>
> "It is accordingly the universal rule that the right of legal subrogation need not rest upon any formal contract or written agreement, nor does it follow from any fixed law; but it exists on principles of mere equity and benevolence, and is founded on the relationship of the parties. However, it is only in cases where the person advancing money to pay the debt of a third person stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. . . ." 25 R. C. L. 1316.

See in accord, Simpson on Suretyship, 205-07 (1950); Sterns, *Law of Suretyship* 439-41 (5th ed. 1951).

[3] The plaintiff is a primary debtor, and the co-owner and later coassignor of the insurance policy. Obviously, therefore, she cannot be a third party and secondarily liable so as to be entitled to subrogation. A person cannot seek subrogation for paying one's own debt.

Accordingly, the Court of Appeals is reversed and the trial courts judgment of dismissal is reinstated.

STAFFORD, C.J., and FINLEY, ROSELLINI, HUNTER, HAMILTON, UTTER, BRACHTENBACH, and HOROWITZ, JJ., concur.

APPENDIX C

In the Supreme Court of the State of Washington

WILLADENE LIVINGSTON, a widow,

Petitioner, Appellant.

vs.

FRED SHELTON, as Administrator of the Estate of Elwyn Judson Livingston, Deceased; Bank of Yakima, a State Bank,

Respondent.

No. 43546

PETITION FOR REHEARING

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the State of Washington:

The Petitioner Livingston, presents this Petition for a Rehearing of the above-entitled Cause, pursuant to Washington Supreme Court Rules on Appeal I-50, and in support thereof respectfully shows:

For clarity, the Petitioner, Livingston, will be referred to as Livingston, or the beneficiary, and the Respondent as Shelton, or the Administrator. The Supreme Court of the State of Washington shall be referred to as the Court.

TRIAL COURT: The trial court dismissed Livingston's Complaint at the close of plaintiff's case.

THE COURT OF APPEALS: The Court of Appeals for the State of Washington, III, on September 16,

1974, by its unanimous Opinion, granted subrogation to Livingston in aid of *RCW 48.18.410* to preserve her exemption rights under this statute to the proceeds of life insurance.

Shelton petitioned the Court of Appeals in the alternative to either affirm the Trial Court or remand the case to the trial court for further proceedings.

The Court of Appeals modified its Opinion and held that Livingston had made a prima facie showing that she is entitled to subrogation, denied the Petition for Rehearing, and remanded the Cause to the trial court for further proceedings in accordance with its Opinion filed November 19, 1974.

SUPREME COURT: On January 22, 1975, review was granted by the Supreme Court of the State of Washington and argument on Review was received by the Court on March 10, 1975.

On July 3, 1975, the Court reversed the Court of Appeals and by unanimous opinion reinstated the Judgment of Dismissal against Livingston.

Livingston seeks a Rehearing upon the following grounds:

1. The Court has overlooked Statutes and Decisions which are controlling as authority and would require a different judgment from that rendered.

2. The Court has adopted the Administrator's erroneous recitation of material facts.

3. The decision of the Court deprives the beneficiary of her exemption rights created by statutory enactment (RCW 48.18.410) pursuant to constitutional mandate. (Wash. Const. Art. XIX, Sec. 1).

4. The exemption granted is absolute and unrestricted. This Statute exempts the proceeds of life insurance from *all* liability of a beneficiary regardless of whether the liability is the community, the separate or the *joint* obligation of the beneficiary.

5. Waiver is an affirmative defense. The decision in effect holds, without supporting evidence, that Livingston waived her exemption rights. No testimony or evidence was received on the question of waiver. The beneficiary was thereby deprived of her constitutional right to be heard in defense of the administrator's claim of waiver.

6. As a matter of law, neither the administrator nor the unsecured creditors have any right, directly or indirectly, to the exempt life insurance proceeds, and Livingston's exemption rights have been ignored.

7. Livingston should be subrogated to the primary source for the payment of the debt where her exempt property was applied in lieu thereof.

OUTLINE OF ARGUMENT FOR REHEARING

The Opinion of this Court is based upon the following premises:

1. That Livingston assigned all of her interest in the three insurance policies to a creditor-bank. She did not. She assigned a security interest only, and re-

tained all her incidents of ownership in the policies.

2. It is true that the Bank elected to take the proceeds of the policies to avoid foreclosure on the real property mortgages, but avoided foreclosure in order to preserve the mortgaged real property for Mrs. Livingston. (St. 16, Ex. 19, 20).

3. The widow was not removed as Executrix for filing her claim against the estate.

4. She filed her claim after she was removed as executrix.

5. The Court agrees that the law is correctly stated in *Livingston v. Shelton*, 11 Wn. App. 854, 526 P. 2d 385 (1974) at page 555 where it distinguishes the cited cases on the ground:

> "In all of the above cases, the loan for which security was given, was made only to the deceased without the beneficiary joining in the obligation to repay or sharing in the right to spend the money advanced."

In three of the cited cases the beneficiary, contrary to the Court's observation, did join in the repayment obligation.

The loan to Livingstons was admittedly a community obligation. Mrs. Livingston, as a wife, did not share in the right to spend the money advanced.

In re Gallagher, supra, is further distinguished by the Court on the ground that sufficient assets were there available to pay all creditors. The existence or non-existence of assets is not material to the claim of exemption. Exemption statutes presuppose insolvency

or precarious financial condition. As distinguished from Gallagher, Livingston did not attempt to defeat inheritance taxes by her claim of subrogation. In referring to Gallagher, the Court stated at page 4 of its Opinion:

> "The Bank therein filed the creditor's claim for the amount which had been borrowed by *deceased and the surviving spouse* and took payment from the insurance proceeds." (Italics supplied).

In Livingston, the Bank therein filed a creditor's claim for the amount unpaid by the deceased at date of death, and took payment from the insurance proceeds. There is no valid distinction on this issue between Gallagher and Livingston. The wife in Gallagher had . . . 'an ownership interest in the policy offered as collateral and . . . voluntarily assigned . . . her rights as a beneficiary in such policy, as a condition to receiving the loan.

6. Mrs. Livingston was a co-debtor only as that term is used to describe a community obligation. At the prima facie stage of this case, there is undisputed evidence that the debt is a community, not separate, obligation of Mrs. Livingston. She did not intend to obligate her separate property, if any. (St. 12) (St. 42).

7. The policy was not the community property of the parties. The insurance proceeds, by agreement between the parties, were the separate property of the wife.

8. Therefore, the plaintiff was owner-beneficiary, not the co-owner-beneficiary of the three policies. Her

husband, before death, transferred his interest to her. If living, the decedent could claim no interest in the policies, and his representatives and his creditors cannot do so after his death. (St. 15).

9. Mrs. Livingston did not

> ". . . voluntarily assign (ed) all her interest, separate and otherwise, in the proceeds of the policy and because of that assignment the loan was made."

She retained title at all times and the physical undisputed facts show that the loan was not made because of the assignment. The loan was made by reason of the mortgages and the past performance of her husband. (St. 46).

10. The Court cites *Lawyers Title Ins. Corp. v. Edmar Constr. Co.*, 294 A. 2d, 865 (D.C.Ct.App. 1972) 869 and *Austin v. Wright*, 156 Wash. 24, 30, 286 Pac. 48 (1932). *Lawyers Title* case which expresses the narrow conventional creditor-debtor-surety relationship does, however, recognize the doctrine of equitable subrogation that should be applied in Livingston. *Austin v. Wright*, supra, in distinguishable for the reason the agreement there was an independent indemnity contract.

11. Livingston is seeking subrogation based upon a substantive right granted her by exemption statute which is in itself remedial. *In re Elliott's Estate*, 74 Wn. 2d 600, 620, 446 P. 2d 347 (En Banc, 1968).

12. The estate is the primary debtor of an admittedly community debt. Livingston used her separate exempt property to reduce the debt and is entitled to

relief regardless of whether the estate is or is not insolvent. When a wife pays a community debt with separate property, she is not paying her own debt.

13. Regardless of any rationale applied to the facts in Livingston, the wife-beneficiary has been deprived of her exemption by the administrator and unsecured creditors, neither of whom are entitled thereto as a matter of law.

14. With the exception of Gallagher, which supports Livingston, the dearth of cases on the subject from community property states in all probability is explained by the fact that to date no personal representative or general creditor of an estate has attempted to invade the exempt property for the benefit of creditors, which property by law was intended for the exclusive benefit of the wife-beneficiary. Equity follows the law. The law is plain that Livingston is entitled to the exempt proceeds of the insurance policies, or in lieu thereof, should be subrogated to the rights of the Bank to the extent of her exempt property.

15. In its reliance upon *Austin v. Wright*, 156 Wash. 24, 29, 286 Pac. 48 (1930), the Court did not recognize the material distinction in subrogation cases between a debt and the security for the debt.

The *Austin* case ". . . was clearly an independent agreement to pay a sum of money . . .".

In Livingston, the beneficiary claimed to be subrogated to the primary security not applied to the repayment obligation.

There is a difference in principle between one claiming subrogation by reason of a security obligation and a claim of subrogation based on a contract of indemnity.

THE ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

APPLICATION OF INSURANCE PROCEEDS IN LIEU OF FORECLOSURE: The Court's statement to the effect that the Bank elected to receive the life insurance proceeds to avoid foreclosure of the real property mortgages does not wholly reflect the record in this case.

All agree that had the Bank applied the primary security to the payment of the indebtedness, the life insurance proceeds for which Livingston seeks subrogation, would have been paid over to her free of any claim of general creditors. There is no difference between the admission above and the case stated by Livingston. No different results should obtain where exempt property — the secondary security — is first applied in reduction of the secured debt. Livingston should be then subrogated to the unapplied primary security.

The application of the exempt life insurance proceeds to the reduction of the secured indebtedness should be further examined in light of the record and the purpose for which the insurance was applied.

At the time the proceeds of the life insurance were applied to the debt, the widow-beneficiary and the

Bank were both represented by the same counsel. There was no conflict of interest. The proceeds of the insurance were applied to the indebtedness in order to save the farm and home and to preserve the beneficiary's exempt property.

Prior to the time Livingston was appointed executrix, and prior to the time that the exempt insurance proceeds were applied to the indebtedness, Mrs. Livingston was informed that the insurance proceeds could not be taken from her for the purpose of paying general creditors; that the funds were exempt to her.

The Court of Appeals doubtless took judicial notice in *In re Livingston Estate*, 7 Wn. App. 584, 502 P. 2d 1247 (1972) that Mrs. Livingston was appointed executrix on January 8, 1969. Mrs. Livingston then was represented by a Yakima firm and an Othello firm of attorneys. An excerpt from Exhibit 19 written by her Yakima attorneys to her Othello attorneys states:

> "I am sending a xerox copy of Chapter 92 of the Session Laws of 1927. Also, will you refer to RCW 48.18.410. We have done a considerable amount of research on this and have come to the firm conviction that where Mrs. Livingston is named the beneficiary of any life policy, this cannot be touched by general creditors."

At the same time, R. E. Lewis, who was doing some work for the estate received the following letter from a Moses Lake law firm which appears as Exhibit 20, a letter dated January 23, 1969. This letter, quoted in part, states:

> "A review of the statutory and case law covering the exemption of life insurance proceeds to the named

> beneficiary, assignee or payee clearly shows that the wife is 'entitled to (all) insurance policy proceeds against the creditors.' The life insurance proceeds 'shall also be exempt from all liability for any debt of the beneficiary, existing at the time the proceeds . . . are made available for her own use."

The advice of counsel received by Mrs. Livingston explains why she raised no objection to the application of the proceeds of the insurance to the Bank's secured debt. Her testimony in this regard appears at *Statement of Facts, page 16*:

> "Q. Did you ever cause the Bank to be notified that you objected to the application of the insurance funds to the payment of the indebtedness?"
>
> "A. No. I didn't object, because Mr. Velikanjie's earlier, in fact a few days after Mike's death, told me by a copy of the letter that where the proceeds are payable to Mrs. Livingston they are not available to general creditors. And my mind was relieved then and I have a copy of that letter."

If the Bank is permitted to bind a beneficiary by its election to apply the proceeds of life insurance to a secured debt which proceeds are the secondary security for the loan in lieu of foreclosure of the real and personal property mortgage, the primary security, a bank can thwart the legislative purpose of enactment of the statutory exemption law and substitute its judgment for that of the legislature. The Court's ruling permits the bank to establish which property is exempt and which is not, and to prefer creditors according to its whim or caprice.

For example: Assume that the largest unsecured creditor of Livingston Estate is one of the bank's depositors. By applying Livingston's exempt property to the payment of the Bank's secured debt, the bank can thereby release the primary security it holds to be used to pay its depositors who are unsecured creditors of Livingston. The Administrator so contends.

The legislature never intended that the exemption rights of Livingston be defeated by permitting the secondary exempt collateral to be used in this manner to pay general creditors of an estate. It was for this and other reasons that the Court of Appeals granted subrogation in aid of the exemption statute to preserve the beneficiary's exempt property.

CASES ON SUBROGATION ANALYZED: The Court of Appeals cited, and relied upon the following decisions in *Livingston v. Shelton*, 11 Wn. App. 854, 526 P. 2d 385 (1974), at page 55:

> "While there is no case in this state decisive of this question, many jurisdictions have recognized a beneficiary's right to subrogation. *Chaplin v. Merchants Nat'l Bank*, 186 F. Supp. 273 (N.D. III, 1959); *Smith v. Wells*, 72 Ind. App. 29, 122 N.E. 334, 123 N.E. 644 (1919); *Barbin v. Moore*, 85 N.H. 362, 159 A. 409, 83 A.L.R. 62 (1932); *Russell v. Owen*, 203 N.C. 262, 165 S.E. 687 (1932); *Katz v. Ohio Nat'l Bank*, 127 Ohio 531, 191 N.E. 782 (1934); *see Ex Parte Boddie*, 200 S.C. 379, 21 S.E. 2d 4 (1942); *Smith v. Coleman*, 184 Va. 259, 35 S.E. 2d 107, 160 A.L.R. 1376 (1945); *In re Estate of Cummings*, 200 Misc. 467, 105 N.Y.S. 2d 104 (1951); *In re Gallagher's Will*, 57 N.M. 112, 255 P.2d 317, 329-30 (1953); *Walzer v. Walzer*, 3 N.Y. 2d 8, 163 N.Y.S. 2d 632, 143 N.E. 2d 361 (1957);

Seitz v. Seitz, 238 Miss. 296, 118 So. 2d 351 (1960); *In re Crossman's Will*, 39 Misc. 2d 1094, 242 N.Y.S. 2d 576 (1963); *In re Estate of Goudiss*, 39 Misc. 2d 18, 239 N.Y.S. 2d 907 (1963); *Rountree v. Frazee*, 209 So. 2d 424 (Ala. 1968); *Murnane v. Murnane*, 447 S.W. 2d 590 (Ky. App. 1969). The right of subrogation depends upon whether the parties to the loan intended the insurance proceeds to be the primary or secondary source for payment of the debt. 16 G. Couch, *Insurance* § 61.328-330 (2d ed. *R. Anderson* 1966); 2A *J. Appleman, Insurance Law and Practice* SS 1311, 1316 (1966); *see* 43 Am. Jur. 2d Insurance SS 717, 718 (1969); Annot., 160 A.L.R. 1376 (1946); Annot., 91 A.L.R. 2d 496 (1963)."

The Court distinguishes the above cases mainly on three grounds:

1. That the loan in question "was made only to the deceased without the beneficiary joining in the obligation to repay, or

2. sharing in the right to spend the money advanced, and

3. the Gallagher Estate had sufficient assets to pay creditors and that subrogation was allowed to reduce inheritance taxes:

First: In three of the cases above the wife did sign the notes in question. In one case she pledged jointly owned stock and consented to the assignment of the insurance.

In re Cummings Estate, the wife-beneficiary signed both the first and second notes. The Court sets forth the relationship between the wife-beneficiary and the estate creditors in the Cummings case as follows:

> "In the case at bar, the widow, at the decedent's request, joined in the assignment of the policies to the bank and also became a joint maker of the note

> thus rendering herself personally obligated to the bank as an accommodation maker, the estate of the deceased remaining as to her primarily liable."

In *Katz v. Ohio Nat. Bank*, supra, the wife joined her husband in the obligation to repay as stated in the language of the Katz case:

> "The principal obligation in this case was the amount owed . . . as represented by the promissory notes executed by Leo Katz and Stella M. Katz."

In *Chaplin v. Merchants Nat'l Bank*, supra, the wife-beneficiary pledged her jointly owned stocks and consented to the assignment of the life policy as security.

Is it the rule in a community property state that a wife who signs a note as evidence of a community debt thereby loses her exemption rights, and a wife who does not sign the note retains her exemption rights?

The question is answered in this state by *Northern Sav. & Loan Ass'n v. Kneisley*, 193 Wash. 372, 382, 386, 387, 388, 76 P.2d 297 (En Banc 1938). The husband and wife in Kneisley both signed the note. The insurance was made payable to Mrs. Kneisley as beneficiary. The community estate was small and set over to Mrs. Kneisley as an exemption in lieu of homestead. Mrs. Kneisley claimed exempt the entire proceeds of the insurance in the sum of $120,000.00. The Court stated, at page 382:

> "Our Statute is apparently more comprehensive than any other, including both 'proceeds and avails.' "

and at page 386, referring to the case of *Holden v. Stratton*, 198 U.S. 202, 49 Law Ed 1018, 25 S. Ct. 656, stated:

> "Referring to the law, this Court said: 'the statute is too plain to require construction. Any other interpretation than to follow the simple and direct mandate of the statute would be legislation.' "

further, at 387:

> "The legislative policy of this state has always been to allow liberal exemptions to debtors. This court has repeatedly declared that exemption statute shall be liberally construed for the purpose of carrying into effect the legislative intent."
> "We are clearly of the opinion that bearing in mind these principles and decisions of this court upon kindred questions, and after giving due consideration to the opinions of courts of other jurisdictions, it must be held that the proceeds or avails of life insurance policies are, under the statute now before us, and *without limitation as to amount*, exempt from obligations enumerated in Section 2 of the Statute (Chapter 92, Laws of 1927, p. 72), and that property belonging to the beneficiary purchased solely with the proceeds or avails, or the income derived therefrom, continues to be exempt. Our attention is not called to any specific property belonging to Respondent which does not fall within this classification." (Italics supplied).

The Laws of 1927, as referenced above, is RRS 7230-1, and the language of the earlier statute is not changed by reenactment as set forth in RCW 48.18.410.

The earlier statute contains language:

> ". . . shall be exempt from all liability for any debt of the person affecting the insurance, or for any debt of the beneficiary existing at the time the policy is made available for his use . . ."

and the later statute:

> ". . . and such proceeds and avails shall also be exempt from all liability for any debt of such beneficiary, existing at the time the proceeds or avails are made available for his use."

In re Elliott, 74 Wn 2d 600 as above cited, and *In re Toweys Estate*, 22 Wn 2d 212, 217, 155 P.2d 273 (En Banc, 1945), cite *Northern Savings & Loan Association v. Kneisley*, supra, with approval.

In re Elliott, 74 Wn 2d 600, 620, 446 P.2d 347 (1968) states at page 620:

> "The Washington statute is remedial in nature and enacted for the public good, and to hold that the cash surrender option *or any other interest of the insured under the policy is a property right which is not exempt but which is available to insured's creditors*, is to wipe out the protective benefits of the policy and defeat the carefully considered and deliberately enacted statutory purpose of the exemption provisions of the Act."

The Court's decision if it stands will wipe out the protective benefit of the statute.

The *Kneisley* case and *German-American State Bank v. Godman*, 83 Wash. 231, 145 Pac 221 (1915) cited *Holden v. Stratton*, 198 U.S. 202, 49 Law Ed. 1018, 25 S.Ct. 656 where the United States Supreme Court examined our life insurance exemption statute and concluded:

> "The wide departure from the legislation of many of the other states, shown by *the unrestricted terms of the Washington statute*, instead of manifesting the intention of the legislature of that state to narrow the exemption to conform to the statutes of other states, on the contrary conclusively shows the intention of the Washington legislature

> to adopt a broader and more comprehensive exemption."

The Kneisley case further stated, at page 387:

> "The rule to be laid down in this case must apply in all cases; equally to the respondent herein, enjoying $120,000.00 which she received from policies of insurance upon the life of her late husband, and to a widow with dependent children, who may receive a comparatively small amount upon which she may be entirely dependent."

Holden v. Stratton, supra, in referring to our statute, said:

> "The statute is too plain to require construction. Any other interpretation than to follow the simple and direct mandate of the statute would be legislation."

RCW 48.18.410 makes no distinction between the separate, the joint or the community obligations of a beneficiary of life insurance. All are exempt. Under our statute, a beneficiary is entitled to the proceeds of the policy against any claim of either the general creditors or the representatives of the insured. The personal representative Shelton is not entitled to the proceeds of the insurance in whatever capacity the claim is made.

If the conclusion of the court is not reconsidered, the intent and purpose of the exemption statute is defeated and the protective benefits of the policy destroyed.

Barbin v. Moore, supra, cites a New Jersey statute similar to the Washington statute creating an insurance exemption. The Court, at page 411 of the Reporter, states:

> "This statute deprives the creditors of any right to lay claim to the insurance, even where fraud upon them is charged."

The language in the New Hampshire statute is as follows:

> "When a policy of insurance is affected by a person on his own life, or on the life of another, expressed to be for the benefit of a third person or his representatives, the party for whose benefit such policy is so expressed to be made shall be entitled to the sum so insured, *against the claims of the creditors or the representatives of the party affecting the same.* P.L.c 277, sec. 2: This statute deprives the creditors of any right to lay claim to the insurance even where fraud upon them is charged."

In *Smith v. Wells*, supra, the husband and wife both executed a bond which was the evidence of the indebtedness, and both executed a deed of trust (mortgage). On the same day, a life policy in the sum of $6,000.00, naming the wife beneficiary, was executed. The bond was the primary obligation. The deed of trust was the primary security, and contained language that required the issuance of the life policy as one of the conditions of the loan. Both the husband and the wife assigned the policy as collateral security for the loan. The Smith case is another of the three cases where the wife signed the evidence of the indebtedness.

Livingston presents a much stronger case. The proceeds of the insurance are exempt to her as a matter of law. To hold otherwise would be to place the Bank of Yakima in the position of the beneficiary of policies assigned to it for security purposes only.

The administrator admitted that the policies were the secondary security, that they were given only:

> "As further collateral to secure said promissory notes . . ." (Pf. Tr. 37, par. 4).

No other conclusion is reasonable under the circumstances. As stated by the Court of Appeals, *Livingston v. Shelton*, supra:

> "Here, nothing in the assignment of the insurance policies or in the other evidence indicates that the insurance proceeds were intended to be the primary source for repayment of the loans. At the time the loans were obtained, the decedent (under 45 years of age) and plaintiff mortgaged or assigned substantial assets other than the three insurance policies to the bank as security. Mrs. Livingston testified, "they (the bank) depended on the mortgages and his (decedent's) past performances." As to the assignments she testified, "I don't think we foresaw Mike's death. That's just something additional that they do require." In the context of the record, it would be unreasonable to infer that the parties intended the insurance proceeds to be the primary source of payment where the existence of those proceeds hinged upon the unanticipated death of the insured, a relatively young man. If this were the intention, the assignments should have so provided or the bank should have been named a beneficiary."

Smith v. Coleman, supra, holds that "collateral means secondary or subsidiary" when referring to insurance assigned for security purposes.

The Smith case supports the rule that the primary security must either be exhausted or if the secondary security is used to pay the indebtedness, that the beneficiary of the life policy is subrogated to the primary

security to the extent that the life insurance proceeds were used in payment of the primary indebtedness.

In Livingston, the administrator seeks to use the beneficiary's exempt property before exhausting either the community property of the parties or the primary security for the debts, which procedure is not permitted under *In re Schoenfeld*, 56 Wn 2d 197, 351 P.2d 935 (En Banc, 1960) and *Graham v. Radford*, 71 Wn 2d 752, 755, 756, 431 P.2d 193 (1967).

In re Gallagher's Will, supra, the assignment of the policy by the husband was the only security for the debt. The court there still held that the estate, not the beneficiary, was primarily liable for the debt. At all times in Livingston, the Bank treated the estate as the primary obligor. It filed its total claim in the estate; it gave credit to the estate for the amount of the insurance proceeds applied to reduce the Bank's secured indebtedness against the community.

In *Walzer v. Walzer*, supra, the spouse did not sign the obligation. However, the Walzer case makes the point that where life insurance proceeds are used to pay a primary obligation of an estate that subrogation results as a matter of right.

In Livingston, the Bank applied the entire proceeds of the three policies against the secured indebtedness. The primary security, namely: the three Farm Units, were retained, and were never applied to the debt as a source of payment. The administrator thereby thwarted the express intent of the legislature. Result: the secondary security is totally applied to the secured in-

debtedness and the primary security is held for the general unsecured creditors.

No one contends, and there is no evidence to prove that the general creditors changed position or extended credit on the existence of the life policies. The general creditors did not change position. Under the Washington law and as a matter of fact, the general creditors are in the same position before death as they are after death. They did not rely upon the insurance proceeds to their detriment under any interpretation of the facts. No credit was obtained from the general creditors by reason of the insurance proceeds. The proceeds of the insurance accrued after death. There is no privity of contract between the general creditors and the decedent, the widow, or the creditors as it pertains to the insurance funds.

The primary obligation to pay the debt was imposed upon the estate, and all parties agree. If the creditors lost any rights, they did so by reason of the statute. Regardless of any argument by the administrator to the contrary, the general creditors of the estate will be paid out of the beneficiary's exempt property if the decision of the court stands.

SECOND, Mrs. Livingston did not share the right to spend the money. The husband acted as the statutory agent of the community. Further, it is admitted that the loans obtained from the Bank of Yakima were obtained for a community purpose. The evidence to the effect that the money was obtained for a community purpose is not disputed. The community bor-

rowed the money. (St.8). Mrs. Livingston did not engage in any separate business, and she had no separate property. (St.9). She never communicated with the Bank and never made application to the Bank to borrow money on her separate liability. (St.10). She never intended to obligate her separate property. (St. 12). She never inherited any property during the lifetime of her husband. (St.13). None of the funds borrowed were used to purchase separate property in her name. She had no control over the funds advanced by the Bank. (St.13). She had a personal account in a joint name with her husband which had nothing to do with the business. (St. 13, 14).

Even the administrator, at page 17-18 of his Brief, admitted the community status of the loan obtained from the bank:

> "It can be seen further that these policies were used and pledged for community purposes to borrow money to operate community business. There is no evidence that the intention of the parties was otherwise."

In the area of common understanding, if material, the administrator should not be permitted from the state of the record to take the position that a wife in a community property state shares in the right to spend the proceeds of a loan and that a wife in a common law state does not enjoy this privilege. There is a stronger limitation imposed in Washington upon the right of a wife to expend business assets than imposed on a wife in a common law state. More persuasive is the fact that the administrator and the Bank recog-

nized the community, not the beneficiary, was primarily liable for the bank loan.

THIRD:

INSOLVENCY: Three of the cases cited by the Court of Appeals and distinguished by the Court are *Barbin v. Moore*, supra, *In re Estate of Goudiss*, supra, and *Murnane v. Murnane*, supra, and are cases where the estates were all rendered insolvent by granting subrogation. Solvency or insolvency of an estate should not become the criteria for the allowance or disallowance of an exemption granted by statute. A statute of exemption is not affected by insolvency. *Northwestern Etc. Co. v. Chehalis County Bank*, 65 Wash. 374, 377, 118 Pac. 326 (1911). Insolvency is the progenitor of exemption statutes.

ASSIGNMENT AS CONDITION TO RECEIVING LOAN:

It is respectfully submitted that observation of the Court that the policies were assigned as a condition to receiving the loan is factually incorrect.

The assignment of Central Life Policy No. 964497 is dated March 22, 1963. (Ex.5).

Safeco Policy, No. 51855, was assigned March 26, 1965. (Ex.6, 18).

The loan on Farm Units 137, 138 and 139, Block 45, was executed February 14, 1966. (Ex.7).

The United Pacific Policy, No. 5761, was assigned August 16, 1966.

The relative dates between the dates of the loans and the dates of assignment refute any finding that the assignments were made as a condition to receiving the loan. As admitted by the administrator, and as it amply appears of record, the assignments of the insurance policies were made for the purpose of furnishing additional collateral security.

In addition to the relative dates between the assignments of the insurance policies and the loans, there is undisputed testimony that the life insurance was not assigned as a condition for receiving the loan from the Bank. (St.46).

The dearth of decisions in a community property state may be readily explained by the fact that to date no one has attempted to manipulate exempt funds to pay unsecured general creditors. It would appear that in Livingston the case is stronger than in the Gallagher case. There is no statutory exemption of insurance proceeds in New Mexico, and the widow Livingston, by her claim of exemption, is not attempting to avoid the payment of inheritance or estate tax.

COMMUNITY OR SEPARATE OBLIGATION

The testimony is uncontroverted that the money borrowed from the bank was borrowed for a community purpose. (St. 8-11).

Q. "What, if you know, was the money on the first note used for?"

A. "It was for the purpose of acquiring community assets for the community." (St.11: 2, 3)

The test to determine whether a note signed by a husband and wife creates a separate obligation of a wife is reviewed thoroughly in *National Bank of Commerce v. Greene*, 1 Wn. App. 713, 717, 718, 719, 463 P.2d 187 (1969) where the Court stated at page 717:

> "The 'acid test' for determining whether the obligation or liability is separate or community in nature is the purpose for which the note is executed. *Fies v. Storey, supra. See Zarbell v. Mantas*, 32 Wn.2d 920, 204 P.2d 203 (1949). If the note is executed for the benefit of the marital community, the presumption of community obligation is not overcome. Thus money borrowed to pay off a community debt or to acquire a community asset is for a community purpose." (Cited cases omitted)

and at page 718:

> "The presumptions created by joint signature of the spouses may be rebutted. Thus the evidence may show that the joint signatures create only a community obligation, (*Finley v. Finley*), 47 Wn. 2d 307, 287 P.2d 475 (1955); *Auernheimer v. Gardner*, 177 Wash. 158, 31 P.2d 515 (1934) . . ."

In Livingston, the money borrowed was borrowed for a community purpose, was a community asset, and was obtained for no other purpose. There is no evidence to contrary.

The ownership of the policies was transferred to the wife by agreement of the spouses. The spouses in a community property state have the right to agree — even orally — as to the status of their property. *Harry M. Cross, Community Property Law in Washington*, 49 WLR Law 49 No. 3 pp. 805, 807. The corollary of the position maintained by this wife-beneficiary as to the use made of her separate property in the life in-

surance proceeds is expressed in *In Re Estate of Trierweiler*, 5 Wn.App. 17, 22, 486 P.2d 418 (1971):

> "We see no reason why a similar lien should not exist where separate property of one spouse is used to improve the separate property of the other. It seems to us that the lien should arise whenever property of one of the three characters (separate property of the husband, separate property of the wife, community property) is used to improve property of either of the other two sorts. (*See Cross, Community Property in Washington*, 15 LaL.Rev. 640 (1955)."

The Court cites "*Occidental Life Ins. Co. v. Powers*, 192 Wash. 475, 74 P.2d 27, 114 A.L.R. 531 (1937); *In re Estate of Coffey*, 195 Wash. 379, 81 P.2d 283 (1938); *King v. Prudential Ins. Co. of America*, 13 Wn. 2d 414, 125 P.2d 282 (1942); *In re Estate of Towey*, 22 Wn. 2d 212, 155 P.2d 273 (1945); *Small v. Bartyzel*, 27 Wn.2d 176, 177 P.2d 391 (1947). Therefore, the plaintiff must be classified as a co-owner beneficiary in the three policies. *In re Estate of Leuthold*, 52 Wn.2d 299, 324 P.2d 1103 (1958)."

Powers, supra, holds that a husband cannot change the beneficiary of life insurance from his wife to his mother and his secretary without the consent of the wife if premiums are paid by the community. The *Powers* holding does not prevent a husband from transferring his interest in the policy to his wife as was done in Livingston.

In re Estate of Coffey, supra, holds that the wife has a vested one-half interest in the insurance:

> "The interest of the wife in the community property estate in this state is not a contingent or expectant interest, but a present, undivided, one-half interest."

Between the taxing authorities and the wife-beneficiary, the wife's half-interest in the insurance is not subject to tax, thus preserving the wife's interest in the policy. *In re Coffey*, supra, is not a case in which the relative rights of the parties is determined by their agreement that one or the other shall own the policy.

King v. Prudential, supra, also holds that a husband cannot change the beneficiary of a life policy paid for by community funds without the consent of the wife.

Small v. Bartyzel, supra, held, quoting *Powers*:

> "In this state, insurance or the proceeds of insurance *are not mere expectancies or choses in action*, but are property; and if the premiums are paid by the assets of the community, they constitute community property.' " (Italics supplied)

It is apparent that a wife has a vested interest in life insurance, a property right that can be transferred by agreement from a husband to a wife. Although none of the cases above cited dealing with the community property aspects of life insurance deal with subrogation, all protect the wife's interest. However, *Powers* does point up the trial court's basic error where it ruled that the wife's interest in the insurance was a mere expectancy, and that she had assigned all her interest in the policy before her interest vested. The trial court:

> "The insurance proceeds that Mrs. Livingston herself assigned to the Bank of Yakima never ripened into an ownership in the plaintiff. During her husband's lifetime, the insurance proceeds were a mere expectancy. Before the expectancy ripened or matured, plaintiff affirmatively assigned and in effect, released all her rights, title and interest in

> said expectancy to the Bank of Yakima as collateral. If the Bank of Yakima had been paid off before the death, the expectancy would have ripened and accrued to the plaintiff and then, and only then, would such insurance have accrued to the plaintiff *as her separate property.*" (St. 64). (Italics supplied).

In re Estate of Leuthold, supra, the court merely holds that the State of Washington is permitted to tax one-half the proceeds of life insurance which named the son, daughter or surviving spouse as beneficiary on the basis that the premiums were paid out of community property, and that all incidents of ownership in the policies belong equally to the husband and wife. There was no transfer of ownership from the husband to the wife in any case cited above by the court, and no question of exemption claimed by the wife-beneficiary. The trial court did hold, inferentially, that the insurance would become separate property of the wife upon the husband's death but for the assignment.

The proceeds of the insurance have never been inventoried by any personal representative or at the request of counsel for the creditors. No one disputed Mrs. Livingston's claim that the proceeds of the insurance were her separate property. (St. 50: 11, 14). *In re Towey*, supra, at page 216, to support the beneficiary's claim that the proceeds were her separate property, there is strong and persuasive language:

> "Where a policy of insurance is taken out by a husband during coverture and made payable to his estate or his executor or administrator and the premiums are paid with community funds, the proceeds of the policy become community property

> upon his death. Where the insured designates his wife beneficiary of the policy of life insurance issued during the existence of the community, even if the premiums on the policy are paid with funds of the community, the proceeds of the policy become, upon the death of the insured, the separate estate of the wife. *Rem. Rev. Stat.* (Sup.) Section 7230-1 (P.C. Section 7854-2); *Northern Sav. & Loan Ass'n v. Kneisley*, 193 Wash. 732, 76 P. (2d) 297."

Remington Revised Statute quoted above was reenacted as *RCW 48.18.440*:

> "Spouse's rights in life insurance policy. (1) every life insurance policy heretofore or hereafter made payable to or for the benefit of the spouse of the insured and every life insurance policy heretofore or hereafter ((as) signed), transferred, or in any way made payable to a spouse or to a trustee for the benefit of a spouse, regardless of how such assignment or transfer is procured, shall, unless contrary to the terms of the policy, inure to the separate use and benefit of such spouse; . . ."

In accord is *Kroloff v. United States of America*, 487 F. 2d 334 (9th Circuit 1973 Arizona), at page 336:

> "The fact that a husband causes or permits a conveyance to be made to his wife tends to show that it was the intention of the parties the property should be her separate estate . . . It is true that this of itself does not conclusively establish the property as being the separate estate of the wife, but it may be supported by proof of the intention of the husband and the wife to such effect, even where it appears the property was paid for with community funds . . . And extrinsic evidence, including the testimony of witnesses, is admissible on this point. (Citations omitted.)"

Catalano v. U.S., 429 F. 2d 1058 (5th Cir. La. 1969) at page 1062:

"We hold that where a husband takes out a policy of insurance on his life and either irrevocably names his wife the beneficiary or makes her the owner of the policy, he retains no interest in the proceeds of the policy under Louisiana law and, therefore, no "incidents of ownership" within Int. Rev. Code, Sec. 2042."

TRANSFER OF INTEREST BY ASSIGNMENT FOR SECURITY PURPOSES

The trial court found, and the Supreme Court adopted the finding, to the effect that the wife-beneficiary in Livingston had voluntarily assigned all her interest, separate and otherwise, in the proceeds of the policies. This finding is an error at law and an error in fact. An assignment for security purposes does not transfer title. *Olson v. National Grocery Co.*, 15 Wn. 2d 164, 166, 167, 130 P. 2d 78 (En Banc, 1942). It is agreed by all that the assignments of the life insurance policies were for a security purpose. The transfer by Livingston for security purposes did not transfer title. The assignor retained all incidents of ownership as shown by the written assignments. Excerpts from the assignments or policies are set forth as follows:

Exhibit 5, Central Life Policy No. 964997, by its title is designated "Assignment of Life Insurance Policy as collateral."

"This assignment is made and the policy is to be held as collateral security . . ."

Exhibit 6, Safeco Policy No. 51855, "Assignment of Policy as Collateral Security."

"This Assignment is upon the condition that it is intended to secure such indebtedness of the as-

signor to the assignee as may exist at the time of settlement under this policy, and this assignment is expressly limited to such of the proceeds under the policy as may be necessary to liquidate said indebtedness, the remainder of the policy being unaffected thereby."

Exhibit 9. United Pacific Policy No. 5761, Exhibit E, page 2:

"This is a copy of the Assignment of proceeds of this policy, as the assignee's interest may appear and does not constitute a change of ownership since it is a conditional assignment and not an absolute assignment. You will note that we acknowledge the right of the owner, Mary Willadene Livingston, to complete this Assignment."

Exhitit 18. Policy No. 51855, page 4. Assignment:

". . . If the Assignment is collateral, all rights of the owner and beneficiary will be transferred only to the extent of assignee's interest. A collateral assignee is not an owner, and a collateral assignment is not a change in ownership . . ."

Again at page 17 of the Shelton Brief, for emphasis:

"It can be seen further that these policies were used in pledge for community purposes to borrow money to operate community business. There is no evidence that the intention of the parties was otherwise."

To this, Livingston agrees.

There is no valid reason why either a secured creditor, or an unsecured creditor, should be placed in the position of a beneficiary of the insurance policy as suggested by the administrator.

In re Schoenfeld's Estate, 56 Wn. 2d 197, 351 P. 2d 935 states:

> "The question in this case is: can community debts of a deceased husband's surviving wife be charged against the separate property of the decedent before the community property is exhausted? The answer is: they cannot."

The corollary of the above rule should be that the separate and exempt property of the surviving wife cannot be applied to a community debt under any circumstances. The Administrator in Livingston has failed to exhaust even the community property in payment of the community debt.

WAIVER OF EXEMPTION

The decision of the Court in effect holds that Livingston waived her exemption rights under *RCW 48.18.410* by assignment of the policies for security purposes.

Washington's original life insurance exemption statute was enacted in 1895 (Chapter 125, Laws of 1895). The intent of the legislature at the time of the enactment of this statute is reflected in the early case law on the subject. It is also noted that our exemption statute is more comprehensive than that of any other state, and is more liberally applied to favor the beneficiary as each amendment is enacted.

Assignment of exempt property for security purposes does not defeat the claim of exemption against any unsecured creditor. *McComb v. Watt*, 39 Okla. 410, 135 Pac. 360, 362 (1913). A mortgage on exempt property does not diminish the exemption rights of the mortgagor. *Collett v. Jones*, 41 Ky. (2B Monroe 1936)

Dec. 586 (1841); *Byers v. Ingraham*, 51 Okla. 440, 151 Pac. 1061 (1915); *Abams v. Fessian*, 11 Ind. App. 598 39 N.E. 530 (1895); *Cheney v. Caldwell*, Mont. 77, 49 Pac. 397, 398 (1897); *Irving v. Willing*, 4 Okla. 128, 44 Pac. 219 (1896); *Brooklyn Loan v. Gross*, 18 N.Y.S. 2d 179 (1940). *Lien v. Hoffman*, 49 Wn. 2d 642, 306 P. 2d 240 (1957), and *Cody v. Herberger*, 60 Wn. 2d 48, 371 P. 2d 626 (1962) are in accord with the principle that Livingston did not waive her exemption rights by assigning her insurance policies as collateral security. The restrictive provisions of our Homestead law is noted to compare the conditions to be met before homestead rights are granted with the unrestricted and absolute exemption granted a beneficiary under our insurance exemption statute.

SUBROGATION

The Court states the rule to be as set forth in *Austin v. Wright*, 156 Wash. 24, 30, 286 Pac. 48 (1930 and *Lawyers Title Ins. Corp. v. Edmar Constr. Co.*, 294 A 2d 865 (D.C. Ct. App. 1972). The *Austin* case is distinguishable. There, the person requesting subrogation had signed an independent indemnity contract. Subrogation was rightly denied. The indemnitor sought to be subrogated to his own independent indemnity agreement. There is a vast difference between *Austin* and the facts in Livingston. Livingston seeks to be subrogated to the right of the Bank in the primary security because her exempt property, the secondary security, was first applied to the indebtedness.

Lawyers Title, supra, recognizes the rule contended for by Livingston that subrogation is not confined to the three party debtor-creditor-surety relationship. Page 869:

> "The right to subrogation depends upon 'the circumstances and equities of the particular case.' (Citation omitted). It is normally enforced only in favor of a superior equity, and it is for the equity court to say who, in good conscience, should bear the loss . . . Accordingly, subrogation may be invoked only where justice (demand) its application and where the equities of the parties asking it (are) greater than those of his adversary." (Citations omitted)

The Court of Appeals was not required to balance the equities between Livingston, the general creditors, and the administrator. The unsecured creditors and the administrator have no equity. The unsecured creditors are deprived by the exemption statute of any legal or equitable right to be paid out of exempt insurance proceeds. The beneficiary's right under the exemption statute is absolute and unconditional. Subrogation is claimed by Livingston in aid of a statutory right and as a procedural remedy.

The administrator asks the Court to deny Livingston's statutory right by denying her a remedy that flows from the statute. The Bank used Livingston's exempt property, and in justice should return the primary security to her.

The beneficiary Livingston is also in a position similar to any wife who pays a community debt with her separate funds. She is entitled to the protection af-

forded by *In re Trierweiler*, supra, and to subrogation as well.

From the inception of this matter, the administrator has permitted the court to erroneously assume that he approved and paid the difference between the amount of the debt, $623,887.46 and the proceeds of the insurance in the sum of $423,516.77, or the sum of $200,370.69.

The administrator is charged with knowledge, and personally knows that the statement to this effect adopted by the Court at page 2 of the Opinion is inaccurate.

Other security held by the Bank was liquidated and applied on the debt. Judgment was taken by the Bank of Yakima in the amount of $123,624.80:

> "against the estate of Elwyn J. Livingston and Willadene Livingston as the former executrix and Fred Shelton as the present administrator of said estate, and L. B. Frozen Foods, Inc."

Prior to Judgment, it was agreed by all parties that the estate was the primary obligor. Certainly the administrator would not have been included as a judgment debtor unless the estate was, in fact, the primary obligor.

The exempt insurance money was paid in order to preserve her interest in the real property. She was not primarily liable, and in equity and at law is entitled to subrogation. However, by the use of her separate exempt funds, Livingston does meet the conventional three party relationship in subrogation.

Lastly, Washington has long recognized that subrogation is not limited to those persons standing in the relationship of a surety or quasi surety.

University State Bank v. Steeves, 85 Wash. 55, 147 Pac. 645 (1915) would appear to be controlling.

The Court, in Steeves, recognizes that the primary security may be primarily liable for the debt and that the primary security, not the maker of the original note and mortgage, should be required in equity to pay the mortgage debt. At page 63, the court states:

> "The doctrine of subrogation is not so restricted in its application as formerly." (Cited cases omitted) "The remedy is no longer limited to sureties and quasi sureties, but is freely applied by courts of equity in all cases where good consciences in equity dictate that a debt paid by one under any sort of legal coercion ought to be paid by another."

To hold that the separate property of a wife is primarily liable for a community debt does violence to our community property system. To hold that property exempt from all liability should be used to discharge a debt in lieu of the primary security does violence to the equitable principles involved in this case.

The insured husband under the facts could not defeat the rights of the wife, and neither should his unsecured creditors nor his personal representative be able to do so.

Apparently, the administrator has accused the beneficiary of mulcting the estate because she claimed a right of exemption granted to her by statute. Livingston merely requested, through subrogation, that she

receive the primary security in lieu of her exempt property. In Livingston, the mortgaged property, not the insurance proceeds, was the primary source of funds for payment of the debt.

SUMMARY

1. This case is based on exemption rights granted by statute.

2. The intent and purpose of the exemption statute has been defeated by the Court's Decision.

3. Livingston is a hard case that may test the legislative wisdom and integrity of the statute, but should not change the legislative purpose or intent of *RCW 48.18.410* or the rights of a life insurance beneficiary thereunder.

4. The parties intended the mortgaged real and personal property to be the primary security for the debt.

5. The primary security was ample to pay the Bank's debt in full and thereby release the proceeds of the insurance to the beneficiary.

6. Had the primary security been applied to the debt, the beneficiary would receive the insurance free of any claim of the unsecured creditors and the administrator.

7. The Court's Decision changed the status of the primary security to a secondary position, and thereby elevated the exempt insurance proceeds to the position of primary security, a result not intended by the parties.

8. The wife-beneficiary has been over reached and deprived of her exemption rights for the benefit of unsecured creditors.

9. The Court's Decision gives the unsecured creditors greater rights than those granted to the widow by the legislature.

10. The size and condition of the estate has no bearing on the law of exemption.

11. The Court's Decision creates a condition precedent requiring the wife to pay unsecured creditors before she can claim her exemption, thus destroying, rather than safeguarding her rights.

12. The administrator has not cited a case wherein a wife-beneficiary is denied subrogation and her exemption rights on facts similar to Livingston.

It is respectfully submitted that the Court adopted the administrator's erroneous version of the facts, overlooked the statute of exemption, and controlling authority that would require a different Judgment than that rendered.

The beneficiary should be subrogated to the Bank's rights in the primary security.

The Opinion of the Court of Appeals should be affirmed and the proceedings remanded to the trial court to require the administrator to prove his affirmative defenses if he, in reality, has evidence in support thereof.

Respectfully submitted,

W. WALTERS MILLER
MILLER & SACKMANN
Attorneys for Petitioner Appellant
210 W. Main — P.O. Box 497
Ritzville, Washington 99169
Telephone: (509) 659-1000

APPENDIX D

S.F. No. 4184-OS-3-68.

In the Supreme Court of the State of Washington

WILLADENE LIVINGSTON, *Respondent,* vs. FRED SHELTON, as Administrator, *Petitioner.*	**No. 43546** **Department**..... **ORDER DENYING PETITION FOR REHEARING**

The Court having unanimously decided that the respondent's petition for rehearing should be denied,

It is ordered that the petition be and it hereby is denied.

Dated this 17th day of October, 1975.

/s/ Stafford C. J.
Chief Justice

FILED
SUPREME COURT
STATE OF WASHINGTON
'75 OCT 17 AM 9:17
/s/ E
WILLIAM M. LOWRY
CLERK
By /s/ TW DEPUTY

85 Wn. 2d 615

APPENDIX E

In the Supreme Court of the State of Washington

WILLADENE LIVINGSTON, a widow,
Appellant,

v.

FRED SHELTON, as administrator of the Estate of Elwyn Judson Livingston, deceased; THE BANK OF YAKIMA, a state bank,
Respondent,

No. 43546
Adams County Cause No. 11185
MOTION FOR STAY OF PROCEEDINGS

Comes now the appellant above-named and represents to the Court that the Court's decision entered herein on the 3rd day of July, 1975, reversing a unanimous decision of the Court of Appeals, Division III, entered on the 16th day of September, 1974, and the Court's Order Denying Motion for Rehearing, entered herein on the 17th day of October, 1975, has in effect repealed by judicial decision Revised Code of Washington Section 48.18.410, has thereby denied appellant her exemption rights grants by statute and has deprived appellant of her property right without due process of law.

NOW THEREFORE, the appellant moves the Court for an order staying execution on any proceeding to enforce the judgment to be entered in favor of the respondent herein, pursuant to the decision of this

Court, and in which Petition for Rehearing was denied and for an order staying the execution of the remittitur of this Court by the Superior Court of Adams County, Washington, until such time as appellant can sue out her Writ of Certiorari to the United States Supreme Court.

DATED this 14th day of November, 1975.

MILLER & SACKMANN
W. Walters Miller, by Thomas F. Sackmann
Attorneys for Appellant
210 W. Main — Box 497
Ritzville, Washington 99169
Telephone: (509) 659-1000

FILED

SUPREME COURT
STATE OF WASHINGTON
'75 NOV 14 PM 2:21
/s/ E
WILLIAM M. LOWRY
CLERK
By /s/ TW DEPUTY
11-14-75

Denied

/s/ Orris L. Hamilton
Actg Chief Justice

APPENDIX F

In the Superior Court of the State of Washington

FOR THE COUNTY OF ADAMS

In the Matter of the Estate of ELWYN J. LIVINGSTON a/k/a E. J. LIVINGSTON *Deceased.*	**No. 4074** **CREDITOR'S CLAIM**

Claim is herewith presented against the estate of said deceased as follows:

Estate of Elwyn J. Livingston a/k/a E. J. Livingston, Deceased.

To Bank of Yakima, P.O. Box 1352, Yakima, Washington 98901, Dr.

Total Secured debt as of December 11, 1968, date of death — $623,887.46.

LESS — Credits from assigned life insurance and other collateral to date — $432,516.77.

Total — $191,370.69.

PLUS — Accrued interest to March 10, 1969 — $4,998.31.

UNPAID BALANCE as of March 10, 1969 — $196,369.00*.

*Accruing interest from March 10, 1969, to date of full payment must be added to unpaid balance shown herein.

SEE "EXHIBIT A" ATTACHED HERETO FOR DETAILS.

(Excerpt from page 1)

APPENDIX G
REVISED CODE OF WASHINGTON

48.18.410 *Exemption of proceeds — Life.* (1) The lawful beneficiary, assignee, or payee of a life insurance policy, other than an annuity, heretofore or hereafter effected by any person on his own life, or on the life of another, in favor of a person other than himself, shall be entitled to the proceeds and avails of the policy against the creditors and representatives of the insured and of the person effecting the insurance, and such proceeds and avails shall also be exempt from all liability for any debt of such beneficiary, existing at the time the proceeds or avails are made available for his own use.

(2) The provisions of subsection (1) of this section shall apply

(a) whether or not the right to change the beneficiary is reserved or permitted in the policy; or

(b) whether or not the policy is made payable to the person whose life is insured or to his estate if the beneficiary, assignee or payee shall predecease such person; except, that this subsection shall not be construed so as to defeat any policy provision which provides for disposition of proceeds in the event the beneficiary shall predecease the insured.

(3) The exemptions provided by subsection (1) of this section, subject to the statute of limitations, shall not apply

(a) to any claim to or interest in such proceeds or avails by or on behalf of the insured, or the person so effecting the insurance, or their administrators or executors, in whatever capacity such claim is made or such interest is asserted; or

(b) to any claim to or interest in such proceeds or avails by or on behalf of any person to whom rights thereto have been transferred with intent to defraud creditors; but an insurer shall be liable to all such creditors only as to amounts aggregating not to exceed the amount of such proceeds or avails remaining in the insurer's possession at the time the insurer receives at its home office written notice by or on behalf of such creditors, of claims to recover for such transfer, with specification of the amounts claimed; or

(c) to so much of such proceeds or avails as equals the amount of any premiums or portion thereof paid for the insurance with intent to defraud creditors, with interest thereon, and if prior to the payment of such proceeds or avails the insurer has received at its home office written notice by or behalf of the creditor, of a claim to recover for premiums paid with intent to defraud creditors, with specification of the amount claimed.

(4) For the purposes of subsection (1) of this section a policy shall also be deemed to be payable to a person other than the insured if and to the extent that a facility-of-payment clause or similar clause in the policy permits the insurer to discharge its obligation after the death of the individual insured by paying the death benefits to a person as permitted by such clause.

(5) No person shall be compelled to exercise any rights, powers, options or privileges under any such policy. [1947 c 79 § .18.41; Rem. Supp. 1947 § 45.18.41.]

APPENDIX H
REVISED CODE OF WASHINGTON

48.18.440 *Spouse's rights in life insurance policy.* (1) Every life insurance policy heretofore or hereafter made payable to or for the benefit of the spouse of the insured, and every life insurance policy hertofore or hereafter assigned, transferred, or in any way made payable to a spouse or to a trustee for the benefit of a spouse, regardless of how such assignment or transfer is procured, shall, unless contrary to the terms of the policy, inure to the separate use and benefit of such spouse; *Provided*, That the beneficial interest of a spouse in a policy upon the life of a child of the spouses, however such interest is created, shall be deemed to be a community interest and not a separate interest, unless expressly otherwise provided by the policy.

(2) In any life insurance policy heretofore or hereafter issued upon the life of a spouse the designation heretofore or hereafter made by such spouse of a beneficiary in accordance with the terms of the policy, shall create a presumption that such beneficiary was so designated with the consent of the other spouse, but only as to any beneficiary who is the child, parent, brother, or sister of either of the spouses. The insurer may in good faith rely upon the representations made by the insured as to the relationship to him of any such beneficiary. [1947 c 79 § .18.44; Rem. Supp. 1947 § 45.18.44.]

APPENDIX I

In the Supreme Court of the State of Washington

WILLADENE LIVINGSTON, a widow,
Respondent,

v.

FRED SHELTON, as Administrator of the Estate of Elwyn Judson Livingston, Deceased;
BANK OF YAKIMA, a State Bank,
Petitioner.

ADAMS COUNTY
FILED OCT. 20, 1975
MILDRED WOMACH, CLERK
BY: MOL. DEPUTY

REMITTITUR

No. 43546

Adams County No. 11185

The State of Washington to: The Superior Court of the State of Washington in and for Adams County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on July 3, 1975, became the final judgment of this court in the above entitled case on October 17, 1975. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Jurisdiction solely for the purpose of determining costs pursuant to SAR 15(d) is retained by the Supreme Court.

The petition for rehearing was denied by Ordler dated October 17, 1975.

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 17th day of October, A.D. 1975

/s/ William M. Lowry
WILLIAM M. LOWRY

Clerk of the Supreme Court, State of Washington

WML:dd

cc: Mr. Shelton
Mr. Miller
Reporter of Decisions

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SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-994

WILLADENE LIVINGSTON,
Petitioner,

v.

FRED SHELTON,
Administrator, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION AND MOTION FOR AWARD OF DAMAGES FOR DELAY

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

FRED SHELTON, Administrator,
Of Counsel
P.O. Box 333, 190 E. Main
Othello, Washington 99344

D. GORDON WILLHITE
Attorney for Respondent
1900 Peoples National Bank Building
Seattle, Washington 98171

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-994

WILLADENE LIVINGSTON,
Petitioner,

v.

FRED SHELTON,
Administrator, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION AND MOTION FOR AWARD OF DAMAGES FOR DELAY

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

---

COMES NOW Fred Shelton, Administrator de bonis non with Will annexed of the Estate of Elwyn Judson Livingston, Deceased, and opposes the Petition for Writ of Certiorari in the above-entitled cause, received on the 13th day of January, 1976, and moves the Court for an Order awarding damages to the Respondent upon the ground that this Petition was sued out merely for delay in the probate of the Estate of Elwyn Judson Livingston, Deceased.

BLEED THROUGH

FORMAT

For convenient reference, Respondent will use the format of the Petition, but will correct any inaccuracies or omissions found in the Petition.

OPINIONS BELOW

In addition to the lower court Decisions cited and set forth in the Appendix of the Petition, the Respondent has added the Judgment of the trial court dated the 26th day of December, 1972, and set forth as Appendix J.

JURISDICTION

There is no title, right, privilege or immunity, or any other claim under the U.S. Constitution, or for that matter, the State Constitution, affected by the judgment herein affirmed by the Washington State Supreme Court. None was raised during three levels of state courts, except on the final petition for rehearing, raising a State Constitution question, no federal one, which was promptly rejected without opinion. This is a common law suit in subrogation. A state insurance statute was argued but found not applicable. There is no federal question here to confer jurisdiction on the U.S. Supreme Court. See argument below.

STATUTE INVOLVED

Petitioner attempts to stretch the provisions of 28 USC, Section 1257 (3) to reach a "title, right, privilege or immunity . . . claimed under the Constitution" to acquire jurisdiction of the United States Supreme Court, but has failed to do so in her Petition. Petitioner sought to be subrogated to a bank claim for money only, under the common law doctrine of subrogation, but was unable to qualify. Petitioner enjoyed "due process" through three

levels of the State courts and raised no Constitutional question until after the final decision of the State Supreme Court. It was rejected there, on rehearing, without opinion and has no substance or merit here. Petitioner has pointed out no "life, liberty," or any specific "property" (except a hypothetical claim for money) that she has been deprived of without "due process of law"—in three years of litigation. See argument below.

QUESTIONS PRESENTED

Respondent rejects Petitioner's "Questions Presented" Nos. 1 and 2 as being inaccurate statements of the questions of law presented in the case appealed from.

> "The failure of the Petitioner to present, with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration, will be a sufficient reason for denying her Petition." 32 Am. Jur. 2d 752, Section 286, Rule 23(4) Rules of Supreme Court.

Respondent herewith restates the true issue found in this case:

1. (in Petition) — Not appropriate.

2. (in Petition) — Not appropriate.

3. Does the denial of an unmeritorious claim under the common law doctrine of "subrogation," for a sum of money only, constitute an abridgment of "any title, right, privilege, or immunity . . . specifically set up or claimed under the Constitution," Amendment XIV of the United States Constitution providing ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," or Article XIX of the Constitution of the State of Washington, providing "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families?"

BLEED THROUGH

Petitioner sets forth in her Petition no such title, right, privilege, immunity, or any specific property or homestead that she has been deprived of with or without due process of law. She is a disappointed litigant for a claim of money under a mythical claim of "subrogation." Her petition sets forth no persuasive legal grounds, and appears to be filed for the purpose of delaying the probate and settlement of her deceased husband's estate. See Argument below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions cited in the Petition are not applicable to this case, nor appropriate, as discussed below. Petitioner cites no language of the constitutional sections upon which she is relying.

STATEMENT OF THE CASE

For convenient reference, Respondent will use the eight definitions and symbol references found on page 4 of the Petition, for identification of the Court, the parties, and portions of the record.

A Concise Restatement of the Case

Petitioner's recital of the facts is so truncated, nebulous, and inaccurate, that her theories and thesis, and her brief as a whole, are rendered unintelligible. This alone is grounds for denying Petition. Rule 23(4), Rules of Supreme Court.

The true facts are these:

Petitioner and her husband, the late Elwyn Judson Livingston, Deceased, herein referred to as decedent, were a marital community under the the community property laws of the State of Washington, and carried on farming opera-

tions, and other related business enterprises through family corporations, in and near Othello, Washington, until the death of the decedent in December of 1968, from injuries received in an auto accident. To finance their enterprises, the decedent and the Petitioner obtained extensive loans from the Bank of Yakima, which required and took, as collateral, mortgages on all of the real propery of the borrowers, including assignment of accounts receivable, a general loan and collateral agreement, and an assignment of four life insurance policies on the life of the decedent with face values of approximately $425,000.00. The decedent had life insurance of a face value in excess of $800,000.00 on his life at the time of his death, and all of it was taken in the name of, or transferred to the name of, the Petitioner as owner, during decedent's lifetime, and the Petitioner was named as beneficiary. Petitioner joined with her husband, individually and as a marital community, in assigning to the Bank of Yakima approximately $425,000.00 of said life insurance, as collateral to secure said loans, which were granted to the decedent and his wife, individually and as a marital community. The general loan and collateral agreement provided that the Bank, at its option, could apply, in any order, any of the collateral in payment of its debt, including the proceeds of the life insurance, in the event of death. Upon the death, the life insurance companies remitted the insurance proceeds to the Bank as assignee of record in the sum of $453,516.77, in exchange for the original policies held by the Bank. The balance owing to the Bank at death was $623,887.46. The insurance companies paid directly to the Petitioner approximately $400,000.00 of the proceeds of policies that were not assigned to the Bank and which sum came into the Peti-

BLEED THROUGH

tioner's hands, outside of the probate, and free of any creditor claims. Said funds paid to the Petitioner were not inventoried in the estate, and are not at issue in this case. At the time of death, the estate was bordering on insolvency. The Petitioner was appointed executrix under the terms of the decedent's Will, qualified, and acted as executrix for approximately two years, until she was removed for mismanagement of the estate. *In re Estate of Livingston*, 7 Wn. App. 841, 502 P.2d 1247 (1972). Respondent, a local lawyer, was appointed administrator to settle and distribute the estate. Creditors of the decedent and Petitioner filed allowable claims in a sum of approximately $400,000.00, which remain unpaid. When Administrator attempted to obtain a court order for the sale of the real property of the estate, including the decedent's family dwelling, Petitioner commenced this action in subrogation. The balance of the debt to the Bank of Yakima, after the application of insurance proceeds and other property, was paid in full by the Administrator, with the written approval of Petitioner's counsel, and the Bank released all of its collateral and mortgages.

By subrogation, the Petitioner seeks to be placed in the shoes of the Bank of Yakima as holder of its mortgages on all of the estate property to the extent of the assigned insurance proceeds paid in the sum of $453,516.77, thereby, in effect, sequestering to herself all of the remaining assets of the estate, and leaving the creditors with no payment at all. The Petitioner is the residual heir of the decedent.

The trial court, a visiting judge, dismissed Petitioner's suit in subrogation, summarily at the close of her case, without hearing the Respondent, and stated that this case

was simple, it was not a subrogation case at all. See Appendix A.

The Court of Appeals, finding no applicable Washington decisional law, erroneously applied, from other non-community property states, a common law rule that permitted widow-beneficiaries, in certain instances, to be subrogated to the liens of assignee-bank-creditors of decedents. The Court of Appeals, in overlooking the assignment, also misconstrued Revised Code of Washington 48.18.410, pertaining to exemption of life insurance proceeds, and reversed the trial court, found that the Petitioner had made a prima facie case for resumption of the trial.

Because of such grievous errors, Respondent, rather than resuming the trial, appealed promptly to the Supreme Court of the State of Washington, which, in a 9 to 0 decision, reversed the Court of Appeals and confirmed the judgment of the trial court, dismissing Petitioner's suit in subrogation. Petitioner's motion to stay proceedings was denied by the Washington State Supreme Court, as noted in the Petition for Writ of Certiorari, page 6.

FEDERAL QUESTIONS RAISED

1. Petitioner, in three levels of the state court, sought to buttress her claim in subrogation by a misinterpretation of RCW 48.18.410. The Washington State Supreme Court properly disregarded said statute because it is not applicable to the facts in this case.

2. For the first time, (page 7.2. of Petition), in her Petition for Rehearing before the Washington Supreme Court, Petitioner attempted to establish a federal question by tying the insurance exemption statute to Article XIX of the

BLEED THROUGH

Washington State Constitution, which provides as follows,

> "The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."

Insurance exemption in Washington is provided by special statute and does not fall under the homestead exemption provided for by the State Constitution, or pursuant thereto.

> "Thus, mattters other than the question of federal jurisdiction or evidence contained in the record will not ordinarily be considered by that court on appeal where they were not presented and decided in the lower court. Similarly, the Supreme Court, on certiorari, will not, as a rule, consider claims not made below, or not timely made, particularly where the questions not raised below is important. 32 Am. Jur. 2d 766, Section 297.

> "As previously indicated, it is essential to jurisdiction of the Supreme Court on appeal from a state statute that there be an explicit and timely insistence in the state court that the statute, as applied, is repugnant to the federal Constitution, treaties, or laws. Thus, the Supreme Court on an appeal will not pass upon the question of the constitutionality of a state statute which was not raised in the proceedings in the state courts." 32 Am. Jur. 2d 768, Section 297.

> "A preliminary step in showing that the state court's decision turned on a federal question, and one which the Supreme Court has uniformly recognized as essential, is that the record shows such a question actually arose or was presented in the case. A second essential step in showing that the state court's decision turned upon a federal question is to show from the records that the state actually passed upon and decided a question of this character. It must also appear from the record, affirmatively or by fair implication, that the decision was necessary to determination of the cause." 32 Am. Jur. 2d 777, Section 303.

3. Petitioner has cited no federal question that would apply to her facts; she has cited no constitutional right that has been abridged, and she pressed none during trial or appeals, and, therefore, Petitioner has not attained jurisdiction of this Court under 28 USC 1257(3) or under Rule 19 of the U.S. Supreme Court.

> "Consequently, the Court will not review a judgment or decree of a state court if the record shows it was, or may have been, rendered upon a ground which did not involve a federal question and which was sufficient to sustain it." 32 Am. Jur. 2d 777, Section 303.

4. Petitioner sought relief under a common law doctrine in equity; her complaint was patiently heard and adjudicated in three levels of the state court; no constitutional rights were asserted or interfered with; Petitioner has qualified for no right to writ of certiorari, any more than any other disgruntled litigant seeking a sum of money under equitable common law principles.

5. Petitioner has not been deprived of life, liberty, or property, without due process of law, nor has she been denied equal protection under the laws, as intended by Amendment XIV of the United States Constitution, nor has she demonstrated otherwise, in her petition. She simply lost a suit in a common law claim for money.

> "As already indicated, the Rules of the Supreme Court provide that where a review of the judgment of a state court is sought, the required jurisdictional appeal, or the petition for certiorari, as the case may be, must specify the state at which and the manner in which the federal questions sought to be reviewed were raised in the courts below, the method of raising them, and the way in which they were passed upon by the court. In addition, the jurisdictional statement must contain such pertinent quotations from the

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> record as will support the assertion that rulings of the state court were of a nature to bring the case within the statutory provisions believed to convert jurisdiction on the Supreme Court, and must include a presentation of the grounds upon which it is contended that federal questions are substantial, which must show that the nature of the case and of the rulings of the state court was such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain the jurisdiction. The petition for certiorari must also contain such pertinent quotations from the record as will show that the federal question was timely and properly raised so as to give the Supreme Court jurisdiction to review the judgment on Writ of Certioari." 32 Am. Jur. 2d 277, Section 303.

These things Petitioner has not done.

REASONS FOR NOT GRANTING THE WRIT

As can be seen from the records and files herein, the Petition for Writ, itself, and by the appendices thereto, the Petitioner attempted to sequester to herself the remaining assets of her husband's estate under the theory of subrogation and thereby leave the creditors of herself and her deceased husband, with claims of approximately $400,000.00, with no payment at all. No place in her case in three levels of the State courts did she press, or argue, the "equities" of her position, because clearly she had none. Equity is the foundation of subrogation. Petitioner had no equity to support her position; in fact, her equities were negative—against herself and her actions could more simply be characterized as "piracy" or self-enrichment. The theory of her subrogation claim finds some decisional support in a series of cases from common law states, where a wife at common law held no title or interest in her husband's property and thereby qualified as a true

third party-subrogee between creditor and debtor husband, required for common law subrogation. Appendix A. None of those cases present the shocking and unconscionable posture of the claim of the "subrogee" in this case.

Lacking the equities, and attempting to establish "third-party" status, Petitioner has adroitly and ingeniously turned to RCW 48.18.410, which expressly provides exemption for proceeds of life insurance, in the hands of the beneficiary. Petitioner blindly misconstrues the plain language of this statute.

The first line of said statute commences:

> "The lawful *beneficiary, assignee, or payee* of a life insurance policy . . . shall be entitled to the proceeds and avails of the policy against the creditors and representatives of the insured . . . existing at the time the proceeds or *avails are made available for his own use.*" Appendix G. (Emphasis ours)

Clearly, this exemption, after an assignment, extends only to the assignee—the Bank of Yakima—and not the beneficiary—Petitioner. Both cannot enjoy the exemption at the same time and the statute reads, in the alternative, "or." Furthermore, the "proceeds or avails" were never "made available for (her) own use." They were rightfully paid to assignee, who enjoyed said statutory exemption.

Petitioner had effectively and irrevocably assigned, as collateral, all of her rights in said insurance proceeds, individually and as a member of the marital community, in writing, to the Bank of Yakima, in exchange for the grant of loan or loans of money to her and her husband in excess of $600,000.00. Death intervened, and the assignment became absolute, and the insurance was applied as intended

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and as agreed. Such insurance proceeds never accrued to her, individually, as a third-party, to qualify her as a subrogee. The Washington State Supreme Court correctly ignored this specious argument and naive misinterpretation of the statute by the Petitioner.

The Washington State Supreme Court has held that even a homestead is not protected by Article XIX of the Washington State Constitution, as Petitioner contends, where the homestead has been voluntarily alienated or encumbered. *Oregon Mtg. Co. v. Hersner*, (1896) 14 Wash. 515, 45 P. 40. How much more so is the conclusiveness of an assigned right that does not enjoy the protection of the Constitution?

Thus, Petitioner, first, has no equitable right and, secondly, has effectively and irrevocably assigned her exemption rights, if any, for a valuable consideration, in the insurance proceeds. She cannot have her cake and eat it, too.

Petitioner has presented no clear and convincing federal question or constitutional question that would give her access to this Court, and her petition should be denied.

> "(In the Petition for Writ of Certiorari) there must be averments so distinct and positive as to place it beyond question that the party bringing the case up for review intended to assert a federal right." 32 Am. Jur. 2d 778-779, Section 304.
>
> "Generally, the federal question must be raised before final decision in the state court and it may be too late where it is presented in an application for rehearing in the highest state court (footnote 10) unless that court entertains the application and proceeds to pass upon the federal question (footnote 11) or exerted its jurisdiction . . . or unless the question respecting the validity if the statute . . ." 32 Am. Jur. 2d 732, Section 261.

These things Petitioner has not done.

RESPONDENT'S ANSWERS TO PETITIONER'S REASONS FOR GRANTING THE WRIT

In her argument, under Reasons for Granting the Writ, Petitioner solemnly intones the Constitution of the State of Washington, in commencing her argument on this insurance exemption statute, but is careful not to recite that the insurance exemption statute was enacted pursuant to any provision of said Constitution.

Petitioner relies heavily on *In re Northern Sav. & Loan Ass'n. v. Kneisley,* 193 Wash. 372, 76 P.2d 297, and proceeds to cite the old insurance exemption statute that has been amended at least three times. Then *Holden v. Stratton,* 198 U.S. 202, 49 L. Ed. 1018, 25 S. Ct. 656, is mentioned; and then she states: "There has been no change in effect in the wording of the Washington life insurance exemption statute since the date of *Holden v. Stratton, supra.*" Then, to immediately contradict herself, the next paragraph sets forth the present wording of the statute, which is substantially different than at the time of the cited cases. This is misleading.

These cases do not support her hypothesis.

Then, the Petitioner, with the language of the statute before her, naively and inexplicably, makes the inaccurate bold statement that "the beneficiary, as petitioner herein, is entitled to the proceeds of the life insurance against the 'creditors and representatives of the insured'." The statute says that the beneficiary (or) *assignee* shall be entitled to the proceeds. Petitioner had assigned them and

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given them up, including the exemption. Her argument is meaningless and transparent.

Starting with this grossly false interpretation of the statute, the Petitioner proceeds to vainly squander meaningless verbiage, completely off the point.

On page 12 of the petition, *1 Barren and Holtzoff* is cited to the effect that final judgment of a state court of last resort may be reviewed by the Supreme Court by certiorari if any right, title, or privilege is claimed under the Constitution of the United States, and states further "The Supreme Court will not review a state court decision, even though a federal question is involved, if the decision rests on adequate state ground," and then continues that the Supreme Court will determine whether the state ground is adequate. Petitioner makes a common law claim, which was adjudicated justly, and the State adequately interpreted its own State statute.

Here, Petitioner has no constitutional ground, or even a federal question, to even knock on the door of this august tribunal.

Petitioner again presses, on page 12, that she was denied a statutory exemption right, deprived of a state constitutional property right, and then she complains that the court or the administrator has cited no case to disprove her theory. Her theory is so groundless that no disproof is indicated or necessary, and need not be dignified.

Next, on page 13, Petitioner cites obiter dicta from *Broad River Power Co.* and *Demorest,* both U.S. Supreme Court cases, that actually hold against her position, and both dismiss the Petition for Writ of Certiorari. The rule cited does not support her.

On page 14, Petitioner argues that the Court in *Livingston* "worked an unpredictable change in the state law." The Court of Appeals said, which constitutes a refutation of this statement, that *Livingston* was a case of first impression in Washington. Thus, she could not have been misled by an unpredictable change.

Petitioner attempts to stretch the holding in *In re Schoenfeld Estate,* on page 15 of her brief, to cover her situation. The case is not apposite. No assignment of the policy was involved.

Petitioner attempts to show discrimination by citing the *Kneisley* and *In re Elliott* cases, on page 17 of her brief, (books and pages are cited on pages 8 and 9). There is no similarity with the *Livingston* case, because neither involve assignment of life insurance.

It is significant that *In re Elliott* cites *Erie R. R. v. Tompkins,* 304 U.S. 64, 8 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487 (1938). The case states:

> "Since *Erie* federal courts have been required to follow local law as expounded by state courts."

How appropriate.

A state court's construction of a state statute is binding on federal courts. *Standard Oil Co. v. New Jersey,* 341, U.S. 428, 95 L. Ed. 1078, 71 S. Ct. 822 (escheat statute).

The *Livingston* case involves local law and interpretation of local statutes. Federal courts do not interfere. Inasmuch as the Petitioner can find no federal or constitutional question, she is not entitled to a Writ of Certiorari.

> "Review by the Supreme Court on certiorari does not encompass local matters and questions of state

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> law, the decision of which does not involve any violation of the Federal Constitution or State laws." (Footnote 11, 32 Am. Jur., *Fed. Practice,* p. 763.)

Petitioner blindly ignores her own factual situation and curiously interprets the insurance exemption statute and plunges forward in a vague and rambling argument that is so irrelevant and illusive in places that it is difficult to grapple with. The petition is an opus of obfuscation. Her only glimmer of hope, in her seemingly endless litigation, was found momentarily in the Court of Appeals. That Court found no Washington case precedent, and, groping for some law, latched onto the inappropriate common law states' rule of subrogation, and then became decoyed into the Petitioner's insurance exemption theory. The Washington State Supreme Court quickly straightened out that aberation.

Notwithstanding her ingenious theory, Petitioner is unable to cite any reasonable grounds under a federal or constitutional question to qualify for the jurisdiction of the Supreme Court.

FURTHER LAW AND ARGUMENT

For jurisdiction, Petitioner relied upon Article XIX of the State Constitution of Washington, which provides as follows:

> "The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."

Yet, her argument is not based on this constitutional Article at all, but on an insurance statute, which was not passed pursuant to homestead exemptions. The insurance statute benefits beneficiaries of all classes not limited to "heads of families."

The jurisdictional federal statute, 28 USC, Section 1257 (3), pertains to the Federal Constitution and not state constitutions.

The U.S. Supreme Court has said:

> "The construction of state constitutions and statutes is a matter for the state courts." *King v. West Virginia*, (W. Va. 1910) 216 U.S. 92, 30 S. Ct. 225, 54 L. Ed. 396.

Petitioner next relies upon the "due process" clause of Amendment XIV of the U.S. Constitution.

Black's Law Dictionary defines due process of law, thusly:

> "Law in its regular course of administration through courts of justice."

Petitioner's rights have been adjudicated through three levels of courts of record of the State of Washington.

Due proces of law has also been defined as follows:

> "Due process of law means a course of legal proceedings, according to those rules and principles which have been established in our system of jurisprudence, for the protection and enforcement of private and personal rights." *Ex parte Stricker* (C.C. Ky. 1901), 109 F. 145.

The Supreme Court has stated further on this:

> "To constitute a violation of this clause, it should appear that such person has a property in a particular thing of which he is alleged to have been deprived." *New Orleans v. New Orleans Water Works*, (La. 1891) 142 U.S. 88, 12 S. Ct. 142, 35 L. Ed. 943.

Petitioner has pointed to no property of which she has been deprived. Her claim is a subrogation for money under the Bank mortgages.

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The Supreme Court has stated further:

> "Law, in its regular course of administration through courts of justice, is due process, when secured by the law of the state, the constitutional requisite is satisfied." *Caldwell v. Texas,* (Tex. 1891), 137 U.S. 697, 11 S. Ct. 224, 34 L. Ed. 816.

On Petitioner's failure to raise a federal question in the State courts, the Supreme Court has said:

> "This court has always held it is a prerequisite to the federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear. A mere denial of the petition by the state court, without opinion, is not enough." *Tidal Oil v. Flanagan,* 263 U.S. 444, 68 L. Ed. 382, 387.

Petitioner failed to raise a constitutional question until she filed Petition for Rehearing, which was denied without opinion. Thus, she cannot reach this court.

That opinion further stated a refutation to one of Petitioner's points, as follows:

> ". . . the mere fact that the state reversed a former decision, to the prejudice of one party, does not take away his property without due process of law." *Tidal Oil Co. v. Flanagan, supra.*

On jurisdiction, the Supreme Court stated:

> ". . . it must affirmatively appear that the federal question was decided and that its decision was essential to the disposition of the case; and that where it is not clear whether the judgment rests on a federal ground or an adequate state one, this court will not review." *Herb v. Pitcarin,* 324 U.S. 117, 65 S. Ct. 459, 89 L. Ed. 789, 795.

That decision held further:

> "It is our purpose scrupulously to observe the long

standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law." *Herb v. Pitcarin, supra.*

Further, on jurisdiction:

"To give the Supreme Court jurisdiction of error to state court, mere assertion of a claim in respect of some constitutional right is not enough, but there must be a real and substantial controversy of the required character which deserves serious attention." *U. S. Fid. & Guar. Co. v. State of Oklahoma,* (1919) 250 U.S. 111, 39 S. Ct. 399, 63 L. Ed. 876.

The Supreme Court states further:

"The court has no jurisdiction, unless a real, and not a fictitious, federal question is involved." *Millinger v. Hartupee,* (Pa. 1868) 73 U.S. 258, 18 L. Ed. 829.

On construction of States statutes, the Court states as follows:

"United States Supreme Court must accept state court's construction of a state statute." *Cramp v. Board of Public Instruction,* (Fla. 1961) 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285.

"State courts have final authority to interpret and, where they see fit, to re-interpret that state's legislation." *Garner v. State of La.,* (La. 1961), 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207.

"The construction of state law is the exclusive responsibility of state courts." *Speiser v. Randall,* (Cal. 1958), 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460.

The Court says that the federal question must be substantial:

"To afford the basis for review, either by appeal or certiorari, the federal question upon which the state court judgment hinges must be substantial." *Zucht v. King,* (1922) 260 U.S. 174, 43 S. Ct. 24, 62 L. Ed. 194.

Thus it has been demonstrated that the Petitioner has

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failed to present a constitutional or federal question to reach the Supreme Court, that her theory is artificial and fictitious, that she enjoyed patient and extensive due process through the state courts, and her petition is without foundation and should be denied.

MOTION FOR AWARD OF DAMAGES FOR DELAY

Respondent hereby moves the Supreme Court of the United States for an Order awarding damages to Respondent for the delay of the probate of the Livingston Estate, caused by Petitioner's Petition for Writ of Certiorari, pursuant to Rule 56(2)(4), Rules of the U.S. Supreme Court.

This Motion is based on the Affidavit of the Respondent annexed hereto as Appendix B, in the sum of $22,050.94, and on the grounds that Petitioner's Petition is patently dilatory and spurious, without supportive legal foundation.

The Livingston Estate has been in probate for seven years and the Respondent has been in litigation nearly five years, involving the Petitioner.

Petitioner is frustrating the orderly administration of this estate with frivolous and groundless litigation, which is dissipating the estate with legal and court costs and permitting the assets of the estate to be dissipated in accruing interest and administrative expense.

CONCLUSION

Petitioner prays the Court to deny the Petitioner's Petition for Writ of Certiorari and award the Respondent damages suffered by the estate for the needless expense and cost accumulating by delay caused by the groundless

and frivolous petition filed by the Petitioner, in the sum of $22,050.94, as detailed in Respondent's Affidavit.

Dated this 6th day of February, 1976.

Respectfully submitted,

D. GORDON WILLHITE
Attorney for Respondent

FRED SHELTON, Administrator
Of Counsel

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APPENDIX A

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

(Sitting for this cause,
In the Lincoln County Courthouse, Davenport)

WILLADENE LIVINGSTON, a widow, *Plaintiff*, v. FRED SHELTON, as Administrator of the Estate of Elwyn Judson Livingstone, Deceased; THE BANK OF YAKIMA, a State Bank, *Defendants.*	No. 11185 JUDGMENT

THIS MATTER having come on regularly before the Court for trial without jury on the 20th day of November, 1972, sitting as a visiting judge, in the Lincoln County Courthouse, Davenport, Washington, Willadene Livingston, Plaintiff, appearing in person and being represented by W. Walters Miller and Richard Miller, her attorneys, Fred Shelton, as Administrator de bonis non with the Will annexed of the estate of Elwyn Judson Livingsston, deceased, appearing in person and representing himself, as said Administrator, and Willadene Livingston testifying and adducing evidence in support of her Complaint, the Bank of Yakima, as Defendant, not appearing, and not having been served with process, and the attorneys for Plaintiff and Fred Shelton, as Administrator, having stipulated that true copies of promissory notes executed by E. J. Livingston and Willadene Livingston, his wife, payable to the Bank of Yakima, evidencing a debt by them due to the Bank of Yakima, with a balance owing of $623,887.46, as of December 11, 1968, and the mortgages given as security thereon, together with assignments of

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other collateral, be admitted in evidence, and having further stipulated that copies of Deeds by which the Livingstons took title to Farm Units 137, 138 and 139, Irrigation Block, 45, Columbia Basin Project, Adams County, Washington, be admitted in evidence, and it being further stipulated that copies or memoranda in evidence of copies of the following described insurance policies, insuring the life of E. J. Livingston, deceased, and copies of the assignments thereof, and the general collateral agreement given to the Bank of Yakima, be admitted in evidence, to-wit: Central Life Insurance Company, Policy No. 964997, dated February 25, 1963; Safeco Life Insurance Company, Policy No. 51855, dated March 10, 1965; and United Pacific Life Insurance Company, Policy No. 5765, dated June 17, 1965; and at the conclusion of Plaintiff's case, Plaintiff having rested; and before the commencement of the Defendant Administrator's case, the Court on its own initiative announced that Plaintiff has no claim in subrogation and that her Complaint would be dismissed; and the Defendant did not further press his defense or his counterclaims, and produced no evidence in support thereof; and the court having examined the evidence, and having read and examined the trial briefs submitted by the parties; and the court having heard the argument of Plaintiff's counsel on the theory of subrogation and having rejected Plaintiff's theory, and the Court being duly advised in the premises, and the Court having heretofore entered its Findings of Fact and Conclusions of Law, now, therefore,

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff's Complaint be dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all of the real and personal property inventoried in the Estate of Elwyn Judson Livingston, Deceased, in probate cause no. 4074, In the Superior Court

of the State of Washington, for Adams County, be, and the same is hereby cleared and quieted in the Administrator of said estate, free of any cloud or encumbrance or restriction, imposed thereon by Plaintiff, by reason of, or arising out of Plaintiff's claim of subrogation, alleged in the above entitled cause, or by reason of any Lis Pendens filed or recorded on the public records, by reason of the above-entitled action or claim of subrogation alleged thereon; and the Adams County Auditor is hereby authorized and directed to release of record any Lis Pendens bearing the caption of the above-entitled cause.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Defendant Administator's counterclaim for attorney fees incurred in defending the above-entitled action and his counterclaim for damages for filing Lis Pendens and actions in frustrating orders of the probate court, be, and the same are hereby dismissed, without prejudice.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Defendant Administrator is entitled to, on behalf of the estate, his costs herein.

Dated this 26 day of December, 1972.

/s/RICHARD J. ENNIS
Judge

Presented by:
/s/FRED SHELTON
FRED SHELTON, as Administrator
of Estate of E. J. Livingston
Deceased.

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APPENDIX B

AFFIDAVITS IN SUPPORT OF MOTION FOR AWARD OF DAMAGES FOR DELAY CAUSED BY PETITION FOR WRIT OF CERTIORARI

STATE OF WASHINGTON }
County of Adams } ss.

FRED SHELTON, being first duly sworn on oath, deposes and says:

That he is the duly appointed and acting Administrator de bonis non with Will annexed of the Estate of Elwyn Judson Livingston, Deceased, in the Superior Court of the State of Washington, in and for the County of Adams, Probate Division, Probate No. 4074.

That he was appointed as Administrator by the Court in January, 1971, and has been at all times since and is now the acting Administrator of said estate.

That Administrator has been trying diligently to wind up the affairs and settle said probate, pay the creditors, and distribute the assets, but has been continually frustrated from doing so by the litigation of the widow of the decedent, the Petitioner.

That it appears to Respondent that the Petition for Writ of Certiorari in the above-entitled Court is sued out for the purpose of further delay.

That said Petitioner has litigated a groundless claim in subrogation against the Administrator for over three years in three levels of the state courts and her claim was conclusively rejected by the court of last resort.

That Petitioner has filed a groundless Petition for Writ of Certiorari in the above-entitled court which will delay the probate proceedings and the settlement of the estate for at least another year.

That certain claims listed below have been reduced to judgment and are bearing interest at an annual rate as shown on Exhibit "A" annexed hereto and by this reference made a part hereof, which constitutes a dissipation of estate funds, and an unfair discrimination against other unsecured general creditors, whose claims have been approved and whose claims do not bear interest.

That the delay of each year that elapses pending the disposition of Petitioner's Petition for Writ of Certiorari will result in a loss to the estate of the sum of approximately $19,050.94 in interest and the sum of $3,000.00 in court costs, attroney fees, and costs of administration as listed below:

Judgment Creditor	*Annual Accrued Interest*
(See Exhibit "A" next page)	
Total	$19,050.94

Unnecessary Costs of Administration in Delay of Estate

Attorney fees, response to Petition for Writ of Review (estimated)	$2,000.00
Estimated costs of travel, telephone, etc., if necessary to attend oral argument	500.00
Estimated extra accounting and bookkeeping	500.00

That the disposition of Petitioner's Petition for Writ of Certiorari to this Court will delay said probate at least a year.

/s/ FRED SHELTON

SUBSCRIBED and SWORN TO before me this 28th day of January, 1976.

/s/ PAUL E. HART
Notary Public in and for the State of Washington residing at Othello. [seal]

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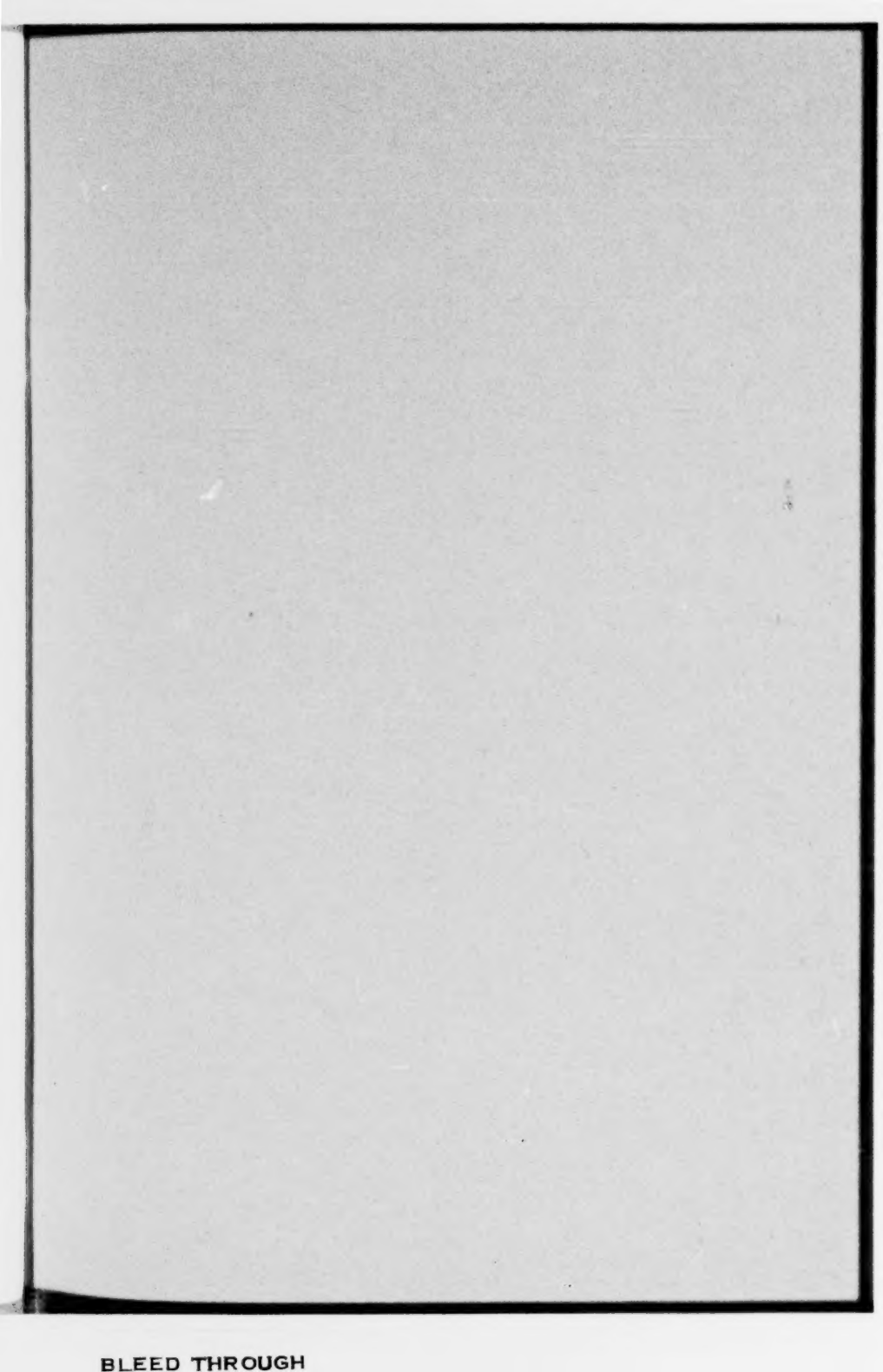
Exhibit "A," Appendix B

Name of Creditors	*Amount of Judgment*	*Rate of Interest*	*Monthly Interest*	*Annual Interest*
Columbia Industries	$ 19,314.33	6%	$ 96.57	$ 1,158.86
Shell Chemical Co.				
(Principal)	$193,419.06	7½%	$1,208.87	$14,506.43
(Accrued Interest)	43,519.17			
(Attorney Fees)	10,000.00			
(Atty. Costs Adv.)	487.90			
Caw and Caw	$ 9,875.00	8%	$ 65.83	$ 790.00
Paul F. Bonnell	$ 1,646.40	6%	$ 8.23	$ 98.78
F.M.C. Corporation	$ 31,210.83	8%	$ 208.07	$ 2,496.87
(This is not a judgment but a note and other papers noting interest)			Total Annual Interest	$19,050.94



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